

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7614

607

CYNTHIA MILLS CLEVELAND, APPELLANT,

vs.

PRESTON DELANO, COMPTROLLER OF THE
CURRENCY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. In the District Court of the United States
For the District of Columbia

No. 2295 Civil Action

CYNTHIA MILLS CLEVELAND, *Plaintiff*,

vs.

PRESTON DELANO, Comptroller of the Currency, and
B. C. SCHRAM, Receiver of First National Bank-Detroit,
Defendants

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1 Filed April 4 1939

United States of America

In the District Court of the United States for the District
of Columbia

No. 2295

CYNTHIA MILLS CLEVELAND, *Plaintiff*,

vs.

PRESTON DELANO, Comptroller of the Currency, and
B. C. SCHRAM, Receiver of First National Bank-Detroit,
Defendants

Complaint

To the Honorable the Judges of Said Court:

Cynthia Mills Cleveland brings this her complaint
against Preston Delano, Comptroller of the Currency, and
B. C. Schram, Receiver of First National Bank-Detroit, and
shows unto this Honorable Court, as follows:

2 (1) Plaintiff, Cynthia Mills Cleveland, is a citizen and resident of the State of California, having resided in Santa Barbara, California, for upwards of five years last past and is of full age.

Plaintiff is the daughter and only heir at law of Merrill B. Mills, who died June 11, 1929, a citizen and resident of the County of Wayne, Michigan.

Plaintiff's father left a last will and testament, which was duly admitted to probate in the Probate Court for the County of Wayne, Michigan, and a copy of which is attached to this Bill as Exhibit A.

Said Last Will named as Executor and Trustee thereof and thereunder, the Union Guardian Trust Company of Detroit, Michigan.

Said Union Guardian Trust Company is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, having its principal office and place of business in the City of Detroit, Michigan; and is now and has been for upwards of twenty years last past, authorized to do a general trust company business and act as a trustee of estates and other trusts and has been so acting and carrying on its said business at said place.

(2) The First National Bank-Detroit is a National Banking Corporation, organized under the Acts of Congress in such case made and provided, and having its principal office and place of business in the said City of Detroit, Wayne County, Michigan. In the year 1932, such First National Bank-Detroit was transacting and carrying on a general banking business in said City of Detroit, Michigan, and was in fact a consolidation of four banks, namely, First National Bank, Peoples Wayne County Bank, Bank of Michigan, and Peninsular State Bank, all of which
3 in the year 1931, were operated separately as banking institutions in the said City of Detroit.

Defendant B. C. Schram is the duly appointed and qualified Receiver of said First National Bank-Detroit, having been appointed by the defendant Comptroller of the Currency's predecessor in the year 1933, and having acted as such Receiver since said date.

(3) Defendant Preston Delano is the Comptroller of the Currency, and he and his predecessors in office having continuously controlled the acts of said defendant, B. C.

Schram, and his predecessor receivers of said First National Bank-Detroit, since its closing in 1933.

(4) Plaintiff shows that continuously from the death of her father to the filing of this complaint, said Union Guardian Trust Company has assumed the full responsibility and authority of the executors and trusteeship of said estate of her father, and has acted upon its sole judgment in all matters pertaining to said trust estate and without consulting this plaintiff at any time prior to 1934, as to the matters hereinafter set forth.

Said Union Guardian Trust Company has represented to plaintiff, and taken the position, at all times during its said Executors and Trusteeship since her father's death that it, said Union Guardian Trust Company, had full and complete knowledge of all the assets of said trust estate and the conditions and details surrounding the same; and that it, by virtue of its business as a Trustee of estates generally, was thoroughly and peculiarly fitted and qualified to act in all matters and determine the same as they came up, for the best interests of said trust estate.

Plaintiff was at all times inexperienced and untrained in business matters generally and unfamiliar with values and other matters pertaining to the corporate stocks hereinafter referred to and held in the possession of said Union Guardian Trust Company as Executor and Trustee of said Mills Estate. She never prior to 1934 was consulted by said Union Guardian Trust Company in the handling of said corporate stocks in said trust estate nor asked to obtain other advice and counsel at any time regarding the same, or in regard to the matters hereinafter set forth at length.

(5) Plaintiff is informed that said Union Guardian Trust Company filed prior to 1934, in the Probate Court for the County of Wayne, Michigan, in the matter of the Estate of her father, Merrill B. Mills, Deceased, various executor's and trustee's accounts, but she shows and charges that no one or more of said accounts contained any information or facts of or concerning the matters hereinafter set forth.

(6) That among the assets of her father's estate and included within the blanket description of "Personal Property—Stocks" (as set forth in the inventory and appraisal of said estate filed by said Union Guardian Trust Company in 1929) there were the following shares, among others, in

Banks and Trust Companies situated in the City of Detroit, Michigan, valued by said appraisal as of June 11, 1929, as follows:

	Appraised Value
Item (1)—710 shares, First National Bank Detroit	\$531,080.00
Item (2)—50 shares, Detroit and Security Trust Company, Detroit	55,650.00
Item (3)—1000 shares, Peoples Wayne County Bank, Detroit	205,500.00

(7) That the Union Guardian Trust Company, as Executor of said Merrill B. Mills Estate and will, did prior to February 1, 1930 exchange three-fourths of said 5 shares specified as items (1), (2) and (3) for 3881 shares of Detroit Bankers Company, said corporation having been organized prior to said February 1, 1930, under the general Corporation Laws of the State of Michigan.

That in the months of February to April, 1930, the average Detroit Stock Exchange market value of said 3881 Detroit Bankers Company shares so held by her father's estate amounted to over \$500,000.00.

(8) That said Union Guardian Trust Company, as Executor of said estate, had in its possession and control in the year 1929, the certificates representing said estates's said shares in said banks as specified in paragraph 6 hereof.

In the year 1929, said Union Guardian Trust Company signed and executed in behalf of said Mills Estate, agreements to exchange three-fourths of said shares (items (1), (2) and (3)) for said 3881 shares in said newly organized Detroit Bankers Company. A copy of said agreements so signed by said Union Guardian Trust Company as executor of said estate are attached hereto as Exhibit B, and the same were duly executed and carried out by said executor, as Plaintiff is informed.

(9) That the said 3881 shares of said Detroit Bankers Company so received by said executor, Union Guardian Trust Company, in exchange for said shares of said two banks and one trust company, were never sold or disposed of during the period from February, 1930, when they were received by said Executor, Union Guardian Trust Com-

pany for said Estate of Merrill B. Mills, Deceased, up to the month of May, 1933, when said Detroit Bankers Company was dissolved by the order of the Circuit Court for the County of Wayne, in Chancery.

6 That although the actual value of said 3881 shares of Detroit Bankers Company was constantly declining from the Spring of 1930 to the Spring of 1933, said executor and trustee, Union Guardian Trust Company, never consulted with, asked the advice of or suggested that plaintiff seek independent advice as to the advisability of selling said 3881 shares of Detroit Bankers Company.

In that connection, plaintiff shows that she has recently caused the annual reports or accounts of said Union Guardian Trust Company as executor and trustee under the said Merrill B. Mills' will, filed in said Probate Court by said Union Guardian Trust Company, to be examined, and that at no time prior to the dissolution of said Detroit Bankers Company in May, 1933, was the true condition of said Detroit Bankers Company and said 3881 shares held in said trust estate, disclosed or referred to, or said declining actual value thereof indicated.

On the contrary, the same was concealed by said executor's and trustee's accounts all throughout the period from the receipt of said 3881 shares of Detroit Bankers Company by said Executor and Trustee, Union Guardian Trust Company, in January, 1930 to the summer of 1933, after said Detroit Bankers Company had been dissolved and said shares had become valueless, and, indeed, a liability to said trust estate as hereinafter set forth.

Such concealment was accomplished by making the accounts filed by said Union Guardian Trust Company carefully omit, and thus conceal, the true condition of said trust estate and the impending loss of the February to May, 1930, market value of said 3881 Holding Company shares, by the use of such descriptions of the said assets, as for example:

7 In the said Executor's Second and Final Account filed in 1933, as follows:

"Detroit Bankers Company—common 3881 shares appraised value \$594,567.21."

(10) Further in that connection, plaintiff shows that over 100,000 shares of said Detroit Bankers Company common stock were sold in the year 1930 on the Detroit Stock Ex-

change, and over 150,000 shares in the year 1931, and 200,000 shares in the year 1932.

Had the said Union Guardian Trust Company, having charge of her father's trust, sold one-half of said 3881 shares of Detroit Bankers Company in the year 1930 at the average market price thereof, and one-half in the year 1931 at the average market price thereof, said Mills Estate trust would have realized a total sum of approximately \$300,000.00.

Such sales would have prevented the total loss of said 3881 shares, which had a total average market value of upwards of \$500,000.00 in February to April, 1930, and represented a considerable part of all the assets of said Mills trust estate as they existed at that time.

Such sales would also have prevented, and saved said trust estate from, a claimed stock assessment liability to defendant Receiver of First National Bank-Detroit of upwards of \$65,000.00 as hereinafter referred to.

(11) Plaintiff further shows that defendant, B. C. Schram, as Receiver of said First National Bank-Detroit now claims upwards of \$65,000.00 from said Union Guardian Trust Company, as trustee of said Mills Estate Trust, on account of a claimed assessment liability previously ordered by the Comptroller of the Currency, against the stockholders of the First National Bank-Detroit, and now claims that said Mills Estate Trust, by holding said 3881 shares of Detroit Bankers Company common stock, must pay said sum of money to said defendant, B. C. Schram, on the theory that said Mills Estate Trust was thereby a stockholder in said First National Bank-Detroit.

That said Receiver bases his said claims upon the opinion and judgment of the Sixth Circuit Court of Appeals in the case of *Barbour v. Thomas* (86 F² 510) which are hereby referred to particularly as though attached hereto, and leave of this Court asked to produce the same upon the final hearing hereof.

So claiming, said defendant Receiver Schram commenced suit in the District Court of the United States for the Eastern District of Michigan, in equity, File No. 8333 on March 8th, 1938, against said trustee, Union Guardian Trust Company, to recover the said claimed assessment liability from the assets of said Mills Estate trust. This plaintiff there-

upon moved said Court in said Equity Cause No. 8333, for leave to intervene, upon her petition therefor, filed March 19th, 1938, and attached hereto as Exhibit C.

Said petition was denied by order of said Court, dated October 31, 1938, attached hereto as Exhibit D.

(12) Plaintiff charges and shows unto this Honorable Court that said Union Guardian Trust Company, as executor and trustee of her father's estate, in the year 1929, and thereafter negligently failed and omitted (with full knowledge in the years 1930 and 1931 of the constantly declining true worth and actual value of the said trust estate's 3881 shares in said Detroit Bankers Company), to sell and dispose of the said Detroit Bankers Company shares in the years 1930 and 1931, for reasons entirely inconsistent with the true rights and advantages and interests of the said Mills' trust estate; all as more particularly set forth in this plaintiff's complaint filed on February 14, 1939, in her suit now pending in said United States District Court for the Eastern District of Michigan, against said Receiver B. C. Schram and said Union Guardian Trust Company, reference to which is hereby made for greater particularity.

(13) That in said cause last mentioned in paragraph (12) hereof, this plaintiff attempted to make defendant Comptroller of the Currency a party thereto as defendant and to obtain an adjudication of the matters and questions in this complaint raised and presented to this Honorable District Court of the District of Columbia; but said Comptroller of the Currency purposely avoided the jurisdiction of said Michigan District Court (although notified of said suit) and directed his representative, said Receiver Schram (also made a party defendant therein) to appear in said cause—and move its dismissal on the ground that said Comptroller of the Currency was not a party thereto, and therefore, that said questions and issues could not be adjudicated and decided in said Michigan District Court, because the Court had no jurisdiction.

(14) And thus by this device, said defendant Comptroller of the Currency seeks and attempts to have his agent and representative, said Receiver B. C. Schram (who acts in all things and matters at and under the sole direction of said Comptroller) collect from plaintiff's said Mills Trust Estate said claimed assessment liability of upwards of \$65,-

000.00 in said Michigan District Court Action No. 8333 in Equity—and

10 (a) At the same time and in the same action avoid the judicial determination of certain defenses of said Mills Estate Trust to said claimed assessment liability, by

(b) absenting himself, said Comptroller, from said Michigan District Court action, and then claiming through his said agent Receiver to said Court—that said defenses constitute a collateral attack on said Comptroller's decision of the necessity of such assessment, due and payable on July 31, 1933; such defenses to said assessment liability being in brief as follows:

(1) That said suit started March 8, 1938, by said Receiver Schram to collect said \$65,000.00 assessment liability is barred by the three year Statute of Limitations—said assessment (due and payable July 31, 1933) and suit now being merely an attempt to collect damages for injuries to property (that is, interest on the deposits after the closing of said First National Bank-Detroit) within the rules of damages announced in such decisions as *Ticonic National Bank v. Sprague*, 303 U. S. 406, 410.

(2) That said Receiver Schram's said suit (Equity No. 8333) to collect said claimed assessment liability is in fact an effort to collect interest on deposits after the closing of the said Bank, and said claim for interest is not a debt, obligation or contract liability of said Bank, for which an assessment could be lawfully levied by said Comptroller or collected by said Receiver.

(3) That said First National Bank-Detroit, never was in fact insolvent.

11 (4) That the present maintenance of said Bank's receivership is unlawful, and merely serves the purposes of—

(a) Paying as fees into said Comptroller's office in Washington at least \$250,000.00 annually of said Bank's assets and

(b) Paying additional Receiver's attorney's fees, the total to date since July 31, 1933, plaintiff is informed now exceeds \$750,000.00 and the details of which are withheld from all stockholders and depositors of said Bank.

(5) The other defenses set forth in plaintiff's said complaint in said Michigan District Court.

(15) That said concerted policy of defendants Comptroller of the Currency and Receiver of said Bank, as set forth in paragraphs 13 and 14 hereof is actually being carried out by them and their attorneys, and operates as a manifest fraud on this plaintiff and the said estate of her father, Merrill B. Mills, deceased.

(16) That Plaintiff had no knowledge of the facts stated herein until in the year 1938.

(17) Plaintiff further shows and charges upon information that said defendant Receiver of said First National Bank-Detroit, B. C. Schram, notwithstanding he has now and has had for several years, full knowledge of the facts and charges set forth in this complaint and in plaintiffs said complaint filed in said Michigan District Court against him on February 14th, 1939, is now demanding of said Union Guardian Trust Company, as Trustee of said Merrill B. Mills Estate, that it pay from the assets of said trust the claimed assessment liability on said 3881 shares of said Detroit Bankers Company, said assessment liability so
12 claimed amounting to a total, including interest, of upwards of \$65,000.00.

That to enforce the payment thereof, on or about March 8th, 1938, said defendant Receiver started suit in said District Court for the Eastern District of Michigan, in cause No. 8333, in Equity to recover said claimed assessment liability from said Union Guardian Trust Company, as trustee, all as hereinbefore set forth, and at the same time attempts to avoid an adjudication of several defenses to such claimed assessment liability, by the devices and subterfuges set forth in paragraphs 13 and 14 hereof.

(18) (a) And Plaintiff shows in that connection that the statement, as of December 31st, 1938, issued by said defendant Receiver, B. C. Schram, of and respecting the liquidation by him of said First National Bank-Detroit, (attached hereto as Exhibit E), sets forth that he has paid said Bank's depositors already eighty cents on the dollar of their total deposits.

That said report or statement of said defendant Receiver Schram further shows that the book value of the remaining assets of said liquidating First National Bank-Detroit (not including uncollected stock assessments) is over \$135,000,000.00 and the "estimated (Receiver's) value" thereof is over \$88,000,000.00. And plaintiff charges upon informa-

tion that said Receiver now has on hand assets, worth in actual value a sum greatly in excess of any and all lawful sums still owing the creditors of said Bank.

(b) Plaintiff further shows that said statement or report discloses that said Receiver's fees, expenses and attorneys' fees are excessive, and totalled on December 31st, 1938, over \$10,000,000.00.

Plaintiff shows upon information and belief and charges that said Receiver now refuses to disclose how much
13 of said excessive sum of \$10,000,000.00 is for said Receiver's attorneys fees and legal expenses and how much are for his own fees, and how much is being paid into the hands of the Comptroller of the Currency as fees, all of which fees Plaintiff charges are unreasonable and excessive. That the defendant Comptroller of the Currency also refuses said information to depositors and stockholders of said First National Bank-Detroit.

(c) Therefore, this Plaintiff respectfully charges that the attempt on the part of said defendant, Receiver Schram, to collect from said Mills trust estate any assessment upon said 3881 shares of Detroit Bankers Company stock, above set forth, at this time and in view of the fact that said remaining assets of said First National Bank-Detroit are more than sufficient to pay all of said Bank's lawful liabilities, operates as a fraud upon said trust estate.

(19) And in that connection, this Plaintiff further shows that any assessment liability to be enforced against said Mills Trust estate in said Michigan litigation, must be for the attempted payment of interest on the deposits of said First National Bank-Detroit for the period after the closing of said Bank.

That since, as a matter of law, such interest is essentially damages for the unlawful detention of property, namely, said Bank's deposits, said Michigan District Court suit (File No. 8333) for recovery thereof from said trust estate is essentially an action by depositors for "injuries" to property, and must be brought within three years from the accrual of such right of action on July 31st, 1933, as required by the provisions of Section 13976, subdivision 2 of the Compiled Laws of Michigan of 1929, and amendments thereto. That, therefore, said action by defendant Receiver is barred and this Plaintiff is entitled to dismissal

14 thereof with prejudice and an injunction restraining its further prosecution thereof.

(20) And in that connection, this plaintiff shows and charges that there can be no lawful assessment by the Comptroller of the Currency of claimed stockholders of the said First National Bank-Detroit, for the reason that the payment of interest on deposits of said Bank, after it closed in the year 1933, is not a contract, debt or engagement of said First National Bank-Detroit within the meaning, intent or scope of the Acts of Congress in such case made and provided, and in particular Sections 63 and 64 of the National Bank Act (Sec. 23, 38 Stat. 273).

(21) And plaintiff further shows that the first order of Comptroller of the Currency directing an assessment against the stockholders of the First National Bank-Detroit was made on the 16th day of May, 1933, at a time when the values of the assets of said Bank were greatly and unduly depressed and were much lower than their intrinsic true worth, and that this was well known by said Comptroller of the Currency at the time of said assessment.

That it would now operate as a fraud upon the rights of the stockholders of said First National Bank-Detroit (whoever they may be) for said Comptroller to now levy any assessment of any amount in order to pay the present liabilities of said Bank, in view of the present admitted fair market value of its assets, which exceeds said liabilities by several million dollars, as appears by said Exhibit E.

And Plaintiff charges that the present attempt of said Defendants Comptroller of the Currency and Receiver to collect said alleged assessment liability from said
15 Mills Estate Trust is a fraud upon said estate and this plaintiff, and that the only ends which said efforts to collect said assessment liability of over \$65,000.00 will serve, will be to add further to said defendant Receiver Schram's fees and attorneys fees and expenses, the amount of which to date, Plaintiff charges are excessive and illegal, and that said defendants conceal the particulars thereof unlawfully from the stockholders and depositors of said First National Bank-Detroit.

(22) This Plaintiff further shows that the enforcement by said Michigan District Court of said claimed assessment liability against the said Estate of her father, Merrill B. Mills, Deceased, would work a great loss and hardship upon

said Trust Estate in the matter of income taxes payable by it, in the event the said defendant Receiver Schram has sufficient assets of the said First National Bank-Detroit in his possession to pay all lawful claims, over and above and without the collection and enforcement against her father's said trust estate of said alleged assessment liability of upwards of \$65,000.00.

This for the reason that under the present income tax laws of the United States the said Mills' trust estate beneficiary now pays income taxes on approximately \$18,000.00 per year in taxable income from said trust.

That if, in the year 1939, said trust estate was compelled to pay said alleged assessment liability to said defendant Schram of \$65,000.00, said trust estate could only take a deduction (if any amount is deductible) from profits on a sale of assets, if such a sale was had. That, therefore, said payment of said assessment liability in, for example, the year 1939 would only result in a very small possible saving to said trust estate by way of a deduction. But, on the

other hand, if it should appear, as plaintiff charges
16 the fact to be, that said defendant Receiver Schram has on hand now, without the enforcement of said alleged assessment liability of \$65,000.00, sufficient to pay all lawful debts and claims of said receivership—and should then be obliged to repay in the year 1940, for example, said \$65,000.00 to said Mills Trust Estate—that said repayment in said 1940 of said \$65,000.00 would result in an actual out-of-pocket loss to said trust estate of about \$15,000.00 in order to pay the income tax on said repayment, under the present income tax statutes.

That, therefore, said trust estate would lose the sum of about \$15,000.00 in payment of income taxes, should said claimed assessment liability of \$65,000.00 be enforced against said trust estate in one taxable year, and the same be returned to the said trust estate, as unnecessarily collected, in another taxable year.

(23) And Plaintiff further shows unto this Honorable Court and charges that one of the positions and claimed defenses assumed by defendant, B. C. Schram, Receiver of said First National Bank-Detroit in said Michigan District Court cases, is that Plaintiff's rights and claims in said Michigan causes cannot be determined by said Michigan Court—and that plaintiff has not the right to present the

above mentioned issues and claims to said Michigan court, for the asserted and claimed reason that the same are, in effect, a collateral attack on the decisions and orders of the Comptroller of the Currency and, therefore, since he is not a party to said Michigan causes (although said defendant Schram is at all times on all matters involved in said claims of assessment liability against said Mills Trust Estate, acting under the direction, control, authority and orders of said Comptroller),

17 that said issues and defenses of said Mills Estate Trust to the assessment claims of said Receiver Schram, cannot be presented to, tried in, or determined by said Michigan Court in said Michigan causes and actions. That such methods of said defendants operate as a fraud upon Plaintiff's rights and interests in her said father's estate, and deprive her of her property without due process of law within the prohibition of the fifth amendment to the Constitution of the United States.

(24) This complaint is filed in behalf of all other stockholders of said Detroit Bankers Company whose rights are similar to those of Plaintiff as set forth herein. Any of such stockholders may intervene in this cause, as directed by this Honorable Court.

(25) The amount involved herein exceeds Three Thousand (\$3,000.00) Dollars, exclusive of costs, to-wit, the sum of Fifty Thousand (\$50,000.00) Dollars and upwards.

Wherefore, plaintiff being without remedy save in this Honorable Court, prays the following relief:

(a) That defendants appear herein and answer this complaint in accordance with the rules and practices of this Court, answer under oath being hereby expressly waived.

(b) That said defendants, Preston Delano, as Comptroller of the Currency, and said B. C. Schram, as Receiver of First National Bank-Detroit, be temporarily and permanently enjoined from further attempts to collect, or collecting, any claimed assessment liability from the assets of the said trust estate of Merrill B. Mills, Deceased, or any part thereof.

(c) That this Honorable Court decree that any further attempts by the defendants Receiver of said First
18 National Bank-Detroit and the Comptroller of the Currency to collect or enforce against or from the said Mills Trust Estate or its assets, any claimed assess-

ment liability of any kind, are a fraud upon its rights and that the same be enjoined temporarily and permanently by this Court.

(d) That this Court decree that any claims of said Receiver Schram against said Trust Estate are barred by the Statute of Limitations of Michigan.

(e) That said defendant Receiver Schram be required to account to this Court and plaintiff for said Receiver's expenses of \$10,000,000.00 and to state the details thereof, item by item, to the end that if said Mills Estate Trust is liable for any part of said asserted assessment liability of \$65,000.00, it may be determined whether any part thereof is deductible on account of excessive over-charges by said Receiver in his legal and administrative expenses, the total of which are now admitted by said Receiver to exceed \$10,000,000.00, an all time high for National Bank Receiverships.

(f) That plaintiff have such other and further relief as may be just and equitable.

CYNTHIA MILLS CLEVELAND,

By WILLIAM ALFRED LUCKING

Her Attorney in Fact.

WILLIAM ALFRED LUCKING

3114 Union Guardian Bldg., Detroit, Michigan

ALBERT W. FOX

Attorneys for Plaintiff.

19

Exhibit A

Filed April 4 1939

Last Will and Testament of Merrill B. Mills

I, Merrill B. Mills, of Detroit, in the State of Michigan, being of sound mind and disposing memory and mindful of the uncertainty of life, do hereby make, publish and declare this instrument as and for my last Will and Testament.

First: I direct that all my just debts and funeral expenses shall first be paid by my Executor hereafter named.

Second: I direct that my remains be interred in the mausoleum owned by me in Woodlawn Cemetery near Detroit, Wayne County, Michigan.

Third: To my uncle, George H. Barbour, of Detroit, Michigan, as a slight token of my appreciation of his many kindly, good offices, in my behalf, I do hereby give and bequeath my diamond solitaire ring and my ruby pin, to be at once delivered to him by my Executor.

Fourth: I give and bequeath the sum of Fifty Thousand (\$50,000) Dollars to my Godson, Edwin Barbour Henry, to be paid by my Executor within six months after my decease.

Fifth: To my cousin, Josephine Barbour, I hereby give and bequeath the sum of Twenty-five Thousand (\$25,000.00) Dollars, to be paid by my Executor within six months after my decease.

Sixth: I give and bequeath the sum of Twenty-five Thousand (\$25,000.00) Dollars to the Protestant Orphan Asylum of Detroit, Michigan, to be paid by my Executor within six months after my decease.

20 Seventh: I give and bequeath the sum of Fifteen Thousand (\$15,000.00) Dollars to the Detroit Free Press Fresh Air Camp of Detroit, Michigan, said sum to be paid by my Executor within six months after my decease.

Eighth: To the Children's Aid Society of the City of Detroit, Michigan, I give and bequeath the sum of Fifteen Thousand (\$15,000.00) Dollars to be paid by my Executor within six months after my decease.

Ninth: I give and bequeath the sum of Twenty-five Thousand (\$25,000.00) Dollars to Thomas E. Gaghan of Detroit, Michigan, in recognition of his faithful services to me for many years past, said sum to be paid by my Executor within six months after my decease.

Tenth: All personal articles of furniture, bric-a-brac, pictures, silverware, ornaments and the like, left to me by my mother or sister, and also my personal effects, jewelry and articles of a household character, it is my wish should be collected and delivered to my daughter Cynthia, upon my decease to be and belong to her absolutely.

Eleventh: All inheritance taxes, if any, on the foregoing bequests shall be paid by my estate.

Twelfth: It is my will and I do hereby direct that my Executor hereinafter named shall, as soon as reasonably may be after my decease, sell and dispose of upon as ad-

vantageous terms as may be reasonably possible my yacht or yachts and cover the proceeds thereof into my estate—its being my express wish and direction that my daughter Cynthia shall not maintain or keep a large yacht.

Thirteenth: All the rest, residue and remainder of my estate, real, personal and mixed, I do hereby devise
21 and bequeath to the Union Trust Company of Detroit, Michigan, as my executor and as trustee, in trust, however, for the following uses and purposes, namely:

To keep and preserve, to invest and reinvest, to conserve and keep together the corpus of my estate and all increase and accretion thereto (except such as is required to carry out the other provisions of my said Will) until the period fixed in the fourteenth and fifteenth subdivisions hereof, and to that end authority and power is hereby given to said executor and trustee to sell and convey any and all of my real estate or other property and to invest the proceeds in good, interest bearing securities and to change such securities from time to time, as the good judgment of said executor and trustee may deem wise.

Fourteenth: Out of my said estate my Executor and Trustee hereinafter named shall pay to Mrs. Margaret Lucy of Detroit, Michigan, the sum of Seven (\$7.00) Dollars per week for and during the remainder of her natural life, in recognition of faithful services rendered by her to my mother.

Fifteenth: Out of my said Estate my Executor and Trustee shall pay to my daughter Cynthia Mills the sum of Three Thousand (\$3,000.00) Dollars per month, payable monthly during the period of five (5) years from my decease; and also shall pay to my said daughter Cynthia Mills after the lapse of said five years last above mentioned and for a period of ten (10) years thereafter the sum of Four Thousand (\$4,000.00) Dollars per month, payable monthly. The income of all real estate shall be used to pay these bequests and so much from personalty income as may be necessary.

Sixteenth: At the end of said period of fifteen years after my decease mentioned and described in the last
22 subdivision hereof, I do hereby will and direct that said trust shall be closed and that all the rest, resi-

due and remainder of my estate then existing shall be and become the property of and be delivered, three-fourths ($\frac{3}{4}$ ths) thereof to my said daughter, Cynthia Mills and one-fourth ($\frac{1}{4}$ th) thereof to my Godson, Edwin Barbour Henry, which residue is hereby devised and bequeathed to them respectively in the proportions above set forth.

Seventeenth: In the case of the decease of my said daughter Cynthia Mills before the period hereinbefore set out for the payment of the residue of said estate, then the annuity provided herein for her, and her said three-fourths share of the residue as above mentioned, shall be and become and be delivered in equal shares to her lawful issue her surviving, if, however, she shall decease without lawful issue her surviving, before said period of distribution of the residue as above provided, I hereby give, devise and bequeath all of the remainder of my estate, to my said Godson, Edwin Barbour Henry, and his heirs and representatives, forever;

Eighteenth: If any person, for whom any bequest or provision is made by this Will shall contest the validity of this Will, he or she shall take nothing of my estate either under this Will or otherwise—and all provisions herein made for him or her shall thereby become null and void.

Nineteenth: I hereby will and direct that my counsel and friend of many years standing, Mr. Alfred Lucking and his firm, shall act as counsel for my estate and I hereby direct my Executor and Trustee to act accordingly.

Twentieth: I hereby nominate and appoint the Union Trust Company of Detroit, Michigan, Executor of this my last will and testament and also Trustee as herein
23 provided and I request the Court having charge of my estate to require only a nominal bond of my Executor and Trustee.

Twenty-first: I do hereby revoke any and all other Wills and codicils by me at any time heretofore made.

In Witness Whereof, I have hereunto set my hand and seal this 25th day of November, A. D. 1921.

MERRILL B. MILLS.

On this 25th day of November, A. D. 1921, Merrill B. Mills, signed, sealed, published and declared the foregoing instrument consisting of four pages to be his last Will and

Testament in our presence; and at his request and in his presence and the presence of each other, we have hereunto set our hands as witnesses.

HOWELL VAN AUKEN,
Residing at Detroit, Michigan.

JAMES W. THOMAS,
Residing at Detroit, Michigan.

24

Exhibit B

Filed April 4 1939

Detroit and Security Trust Company
\$13,500,000 Invested Capital
Detroit

In Reply Refer To

October 5, 1929.
Telephone
Randolph 5670

To the Stockholders of the Detroit
and Security Trust Company:

We enclose herewith communication and enclosures mentioned in it, addressed to the stockholders of the four banks and this trust company mentioned therein.

The facts respecting the proposed combination of these five financial institutions, the reasons for it and the bases of exchange of stocks of the respective banks and the trust company for stock of the holding Company, the Detroit Bankers Company, are covered by that communication.

You will notice from this that you will receive for each share of Trust company stock you now hold of the par value of \$100, ten shares of stock of the Detroit Bankers Company of \$20. par value.

We believe that this exchange is upon a basis fair to you. You will note that with the proposed dividend of 17% per annum the dividends upon your stock will be a little over twice what they have been heretofore.

This affiliation with the four Detroit banks makes it unnecessary for us to establish a banking department and will relieve this company from the competition of
25 the trust departments which they were establishing,
and will result not only in considerable economies in

operation but in a substantial increase of trust business. We believe it to be for your best interests, and we recommend deposit of your stock as suggested in the general letter enclosed herewith.

Yours respectfully,

RALPH STONE,
Chairman of the Board.

ALBERT E. GREEN,
Vice Chairman.

McPHERSON BROWNING,
President.

Detroit, Michigan.
October 5, 1929.

To the Stockholders of
Peoples Wayne County Bank
First National Bank in Detroit,
Detroit and Security Trust Company
Bank of Michigan
Peninsular State Bank:

The Boards of Directors of the above banks, and trust company, at meetings held on September 27, 1929, unanimously adopted resolutions recommending to their stockholders the exchange of their stock for stock of a holding corporation to be organized, to be known as Detroit Bankers Company.

The Banks and Trust Company to be affiliated in this way will have combined capital, surplus and undivided profits of approximately \$90,000,000.00 and resources of about \$725,000,000.00. This represents approximately 60% of the total banking resources of Detroit, and the new institution will be the largest of its character in Michigan and the largest between New York and Chicago. The institutions so affiliated will have 192 branches, and will serve approximately 900,000 depositors and clients.

The Detroit Bankers Company will have an authorized capital of \$50,000,000.00 with 2,500,000 common shares of the par value of \$20 per share. Of this amount \$35,000,000.00 will be exchanged for stocks of the four banks and the trust company, the balance of \$15,000,000.00 remaining

in the treasury of the company. The Charter will provide that the Directors shall have power to issue this stock in exchange for capital stock or assets of other financial institutions. In case the stock is sold for cash, each stockholder will have the right to subscribe for his proportion. There will also be the trustee stock mentioned below.

Julius H. Haass will be president of the company. The Board of Directors will be twelve in number, as follows: Julius H. Haass, President and John R. Bodde, Vice President of the Peoples Wayne County Bank; Emory W. Clark, Chairman of the Board and D. Dwight Douglas, President of the First National Bank in Detroit; Ralph Stone, Chairman of the Board and McPherson Browning, President of the Detroit and Security Trust Company; John Ballantyne, Chairman of the Board and T. W. P. Livingstone, President of the Bank of Michigan; Herbert L. Chittenden, President of the Peninsular State Bank; Fred J. Fisher, William T. Barbour and Wesson Seyburn. In order to insure the maintenance of existing policies, it is proposed that the first Board of Directors shall continue for a period of five years and to accomplish this purpose, the Charter will provide for the creation of 120 shares of Trustee stock so called (in addition to the par value stock mentioned above) without par value, and for the sole voting power for directors to be vested in the Trustee stock until December 31, 1934. This stock will be issued in the names of the directors as trustees for the benefit of all holders of common shares of the company, and will not be entitled to any dividends or assets whatsoever and will be cancelled on December 31, 1934, upon payment of \$10.00 per share, at which time all the voting power will vest in the par value shares.

The plan will become effective when 66-2/3rds% in amount of the stock of each of the above banks and trust company is deposited for exchange.

The exchange of stock will be made upon the following bases:

Peoples Wayne County Bank—one and one half shares of the new company stock of \$20. par for each share of present stock of the bank of \$20. par;

First National Bank in Detroit—4.666 shares of the new company stock of \$20 par for each share of present stock of the bank of \$100 par;

Detroit and Security Trust Company—10 shares of the new company stock of \$20.00 par for each share of present stock of the company of \$100 par;

Bank of Michigan—3 shares of the new company stock of \$20 par for each 4 shares of present stock of the bank of \$20 par;

Peninsular State Bank—4.1 shares of the new company stock of \$20 par for each 5 shares of present stock of the bank of \$20 par;

28 Certificates for fractional shares of stock in the new company will not be issued but scrip certificates will be issued to each person entitled to a fraction of a share, which scrip certificates when combined to equal or exceed one share will be exchangeable for a certificate for such share of stock and a new scrip certificate will be issued for any excess fraction of a share remaining. The scrip will not be entitled to dividends nor have any voting power.

It is proposed that dividends be paid upon the common stock of the new company, in the aggregate amount of 17% per annum, payable quarterly.

In order that each customer of these allied institutions may continue to enjoy all existing connections and facilities, it is planned to carry on each institution as at present organized.

This forward looking step is in harmony with the trend of modern banking. In order that the advantages of the plan may accrue to the stockholders at as early a date as possible, it is very important that you deposit your stock at once.

There is enclosed herewith a form of agreement and power, which should be executed by you, duly witnessed, and returned with your certificates of stock of the above banks and trust company, endorsed by you in blank and duly witnessed. The signatures on the stock and agreement and power must correspond. They should be forwarded to Detroit and Security Trust Company, Depository, which institution will issue in exchange therefore a transferable certificate of deposit, which in turn will be exchangeable for common stock of the new company, upon the consummation of the plan. The corporation will attach the necessary revenue stamps.

22 CYNTHIA MILLS CLEVELAND VS. PRESTON DELANO.

29 No Federal income tax will accrue on the exchange of your stock.

Yours respectfully,

PEOPLES WAYNE COUNTY BANK,
JULIUS H. HAASS, *President*,
JOHN R. BODDE, *Vice-President*.

FIRST NATIONAL BANK IN DETROIT,
EMORY W. CLARK, *Chairman of the Board*,
D. DWIGHT DOUGLAS, *President*.

DETROIT AND SECURITY TRUST COMPANY,
RALPH STONE, *Chairman of the Board*,
ALBERT E. GREEN, *Vice-Chairman of the Board*,
McPHERSON BROWNING, *President*.

BANK OF MICHIGAN,
JOHN BALLANTYNE, *Chairman of the Board*,
T. W. P. LIVINGSTONE, *President*.

PENINSULAR STATE BANK,
E. J. HICKEY, *Chairman of the Board*,
H. L. CHITTENDEN, *President*.

30 Bank of Michigan
formerly
The Dime Savings Bank
Merchants National Bank
Detroit

Filed April 4 1939

October 9th, 1929.

To the Stockholders of
Bank of Michigan:

We enclose herewith communication, and enclosures mentioned in it, addressed to the stockholders of the four banks and trust company mentioned therein, outlining the proposed combination of the banks and trust company and urge that you deposit your stock promptly in accordance with the plan as outlined.

You will notice from this that you will receive for each four shares of stock of this bank of the par value of \$20

which you now hold, three shares of stock of the proposed holding company of \$20 par value. We believe that this exchange is upon a basis advantageous to you. You will note that with the proposed dividend of 17% per annum the dividends upon your stock will be equivalent to 12 $\frac{3}{4}$ % on the par value of your investment in the Bank of Michigan instead of 12% as heretofore.

In order that the stockholders who receive fractional warrants may purchase other warrants to make a full share, or sell such fractional warrants, the facilities of our bond department will be available to you without cost. Fractional warrants will be bought or sold on the basis of quoted values.

Yours respectfully,

T. W. P. LIVINGSTONE,
President.

JOHN BALLANTYNE,
Chairman.

31 Peninsular State Bank
Detroit, Michigan

Filed April 4, 1939

October 9, 1929.

To the Stockholders of the
Peninsular State Bank:

We enclose herewith communication addressed to the stockholders of the four banks and trust company which are about to affiliate.

This communication clearly outlines the facts, respecting the proposed combination of these five financial institutions, and the reasons for it, as well as the basis of the exchange of stock of the respective Banks and Trust Company for the stock of the Detroit Bankers Company.

As a stockholder of this Bank you will receive 4 $\frac{1}{10}$ shares of the Detroit Bankers Company's stock of \$20.00 par value for five shares of this Bank's stock of \$20.00 par value. The proposed dividend of the Detroit Bankers Company is to be \$3.40 per share annually payable 85 cents per share quarterly, this being equivalent to 17% on the par value of the shares.

We believe this exchange of stock is particularly advantageous to you and the basis exceptionally fair. This affiliation enables you to participate in the benefits that will accrue from the growth and success of these financial institutions. We believe it to be for your best interest and we recommend that you deposit promptly your stock as suggested in the general letter enclosed herewith.

In order that stockholders who receive fractional warrants may purchase other fractional warrants to make full shares, or may sell such warrants, the facilities of
32 our bond department will be available without charge.

The fractional warrants will be bought or sold on the basis of quoted values.

Yours respectfully,

E. J. HICKEY,
Chairman of the Board.

H. L. CHITTENDEN,
President.

First National Bank in Detroit

To the stockholders,

First National Bank in Detroit:

Your Directors, without a dissenting vote, have agreed to a plan for the merger of the following banking institutions of this City:

Peoples Wayne County Bank
First National Bank
Detroit & Security Trust Company
Bank of Michigan
Peninsular State Bank

The plan has also received the approval of the directors of the four other institutions. It contemplates that the stock of the five institutions shall be taken over by a holding company, which, in exchange therefor, shall issue its own stock. Full details are given in the general letter which accompanies this communication.

The stockholders of the First National Bank will receive 4.466 shares of stock of the holding company of the par value of \$20 per share for each share of their present stock

of the par value of \$100 per share, and on the proposed dividend rate of 17% the total dividend paid to First National Bank stockholders will be somewhat in excess of the present return.

33 A market will be established for handling such scrip as may be issued for fractional shares so that the holder may sell, or buy up to a full share.

Your directors recommend the deposit of your stock as suggested in the general letter. They are satisfied that the proposed division is entirely fair to all parties and that the adoption of the plan will be for the best interest of the stockholders.

EMORY W. CLARK,

Chairman of the Board.

WILLIAM J. GRAY,

Vice-Chairman.

D. DWIGHT DOUGLAS,

President.

Dated, October 1, 1929.

Member Federal Reserve Bank

United States Depositary

Peoples Wayne County Bank

Invested Capital over \$38,000,000

Detroit, Michigan

October 9, 1929.

To the Stockholders of the
Peoples Wayne County Bank:

We enclose herewith communication and enclosures mentioned in it, addressed to the stockholders of the four banks and the trust company mentioned therein, outlining the proposed combination of the banks and trust company and urge that you deposit your stock promptly in accordance with the plan as outlined.

34 You will notice from this that you will receive for each share of stock of this bank of the par value of \$20.00, which you now hold, one and one-half shares of stock of the proposed holding company of \$20.00 par value.

We believe that this exchange is upon a basis advantageous to you. You will note that with the proposed dividend of 17% per annum, the dividends upon your stock will

be equivalent to 25½% on the par value of your investment in Peoples Wayne County Bank stock instead of 20% as heretofore.

In order that stockholders who receive fractional warrants may purchase other fractional warrants to make a full share, or may sell such warrants, the facilities of our bond department will be available without charge. The fractional warrants will be bought or sold on the basis of quoted values.

Yours respectfully,

JULIUS H. HAASS,
President.

JOHN R. BODDE,
Vice-President.

35

Filed April 4 1939

Agreement for Exchange of Shares of
Peoples Wayne County Bank
First National Bank in Detroit
Detroit and Security Trust Company
Bank of Michigan
Peninsular State Bank

For shares of
Detroit Bankers Company

Agreement and Power

The undersigned, pursuant to the letter dated October 5, 1929, from the Executive Officers of the several institutions herein named, and for the purpose of agreement thereto and carrying out the plan and purpose thereof, does hereby make, constitute and appoint Julius H. Haass, John R. Bodde, Emory W. Clark, D. Dwight Douglas, Ralph Stone, McPherson Browning, John Ballantyne, T. W. P. Livingstone, H. L. Chittenden, Fred J. Fisher, William T. Barbour, and Wesson Seyburn, hereinafter referred to as the "Committee," or any of them who may be designated by the others to act for all, as the Agent and Attorney of the undersigned, with the power and authority to carry out the objects and purposes following:

To organize a corporation for the initial purpose of acquiring shares of the outstanding capital stock of the following several institutions located in the City of Detroit,

Michigan, viz.: Peoples Wayne County Bank, First National Bank in Detroit, Detroit and Security Trust Company, Bank of Michigan and Peninsular State Bank.

36 Such a new company shall have at the time of its organization, an authorized capital stock of \$50,000,000.00, represented by 2,500,000 common shares of the par value of \$20 each and 120 shares of no par value to be known as Trustee shares, which Trustee shares shall be issued to the above named persons as trustees for the benefit of all stockholders of said institutions, coming into the plan. Said Trustee shares shall not participate in dividends, assets or subscription rights, but until December 21, 1934, shall have exclusive voting power in the election of Directors, and no increase or decrease of the capital stock shall be authorized or other class of stock created, or sale of all the property or business of this corporation, or the sale of any substantial part of the shares of capital stock or property or business of any of the five institutions above named be authorized, except by and with the vote of at least two-thirds of all of the shares of each the Common and the Trustee stock outstanding. Upon December 21, 1934, said Trustee shares shall be redeemed and cancelled upon payment of \$10.00 per share.

The new company shall have the ordinary powers of a holding company and such additional powers and provisions as the Committee shall determine upon and approve.

Of the capital stock authorized by the original Articles of Association, \$35,000,000.00 par value of common shares will be set aside for exchange for stocks of the institutions above named until such time as the Board of Directors of the Company shall otherwise determine, on the bases following:

Peoples Wayne County Bank—one and one-half shares of the holding company stock of \$20. par for each share of present stock of the bank of \$20. par;

37 First National Bank in Detroit—4.666 shares of the holding company stock of \$20 par for each share of present stock of the bank of \$100. par;

Detroit and Security Trust Company—10 shares of the holding company stock of \$20 par for each share of present stock of the company of \$100 par;

Bank of Michigan—3 shares of the holding company stock of \$20 par for each 4 shares of present stock of the bank of \$20 par;

Peninsular State Bank—4.1 shares of the holding company stock of \$20 par for each 5 shares of present stock of the bank of \$20 par.

The Charter will provide that the Directors shall have power to issue the balance of \$15,000,000.00 par value of Common stock and any other like stock which may subsequently be authorized, in exchange for capital stock or assets of other financial institutions. If any of the stock is sold for cash or used otherwise than for exchange as aforesaid, each holder of common stock will have the right to subscribe for his proportion.

The Committee shall have full power and authority to incorporate or cause to be incorporated, the new company above referred to under the laws of Michigan, determine upon the name and provisions of its Charter, adopt by-laws and form of stock certificates, to elect the first Board of Directors thereof and to cause shares of stock of said new company to be issued sufficient to fully carry out the provisions of this plan and do all things necessary or proper in their discretion to effectuate said plan. The common stock issued by said corporation shall be subject to the same liability as shares of the capital stock of a bank and/or trust company organized in Michigan, and/or shares of capital stock of a national bank.

38 In consideration of the execution of this Agreement and Power by other stockholders of the institutions hereinbefore named and the deposit by such other stockholders of stock of said institutions, the undersigned hereby deposits with Detroit and Security Trust Company of Detroit (hereinafter called Depositary) certificates of stock as below described, of one or more of said institutions, which certificates have been endorsed in blank, and the undersigned hereby irrevocably authorizes said depositary to surrender in accordance with this Agreement and Power, said certificates so deposited to said new Company, but only upon delivery to said depositary for the account of the undersigned of new certificates representing the number of shares of the common stock of said new company for each share of stock hereby deposited, as specified in the basis of exchange hereinbefore set forth. The deposit of said certificate is upon condition that there be issued to the undersigned by the Depositary a transferable certificate of

deposit, calling for the delivery to the undersigned of certificates representing Common stock of the new company as above set forth upon consummation of the plan and upon surrender of said certificates of deposit to the Depository for cancellation.

It is understood that certificates for fractional shares of stock in the new company will not be issued but scrip certificates will be issued to each person entitled to a fraction of a share, which scrip certificates, when combined to equal or exceed one share, will be exchangeable for a certificate for such share of stock and a new scrip certificate will be issued for any excess fraction of a share remaining. Such scrip will not be entitled to dividends of voting rights.

It is understood and is a condition hereof, that the stock deposited by the undersigned is to be so exchanged
 39 only with and as a part of at least 66 2/3rds% in amount of the stock of each of said institutions.

The undersigned hereby approves and agrees to the plan herein and in said Executive Officers' letter set out for the organization of said new company and the issuance and disposition of its securities and the exercise of the powers conferred upon the Committee.

This Agreement and power shall be binding upon the undersigned, his heirs, executors and assigns.

Dated, October, 1929.

.....
 Address.....
 (Street Number)

 (City) (State)

Signed in the presence of:

.....

The Certificates deposited as state in the foregoing are as follows:

Certificate Number	No. of Shares	In Name of	Bank or Trust Co.
.....			
.....			
.....			
.....			

40 *Exhibit C*

Filed April 4 1939

United States of America

In the District Court of the United States
for the Eastern District of Michigan

Southern Division

In Equity

B. C. Schram, Receiver, etc.	}	No. 8333
Plaintiff,		
v.		
Union Guardian Trust Company,		
Trustee of the Estate of		
Merrill B. Mills, Deceased,	}	
Defendant.		

Petition of Cynthia Mills Cleveland for Leave to Intervene

Your petitioner, Cynthia Mills Cleveland, of the city of Santa Barbara, California, respectfully represents:

(1) That she is the daughter and sole heir at law and residuary legatee of said deceased, who died June 11, 1929, a resident of the County of Wayne, Michigan.

(2) That the estate of petitioner's father was duly probated in the probate court for the County of Wayne, Michigan, and the above named defendant is the testamentary trustee of said estate and has in its possession and control assets of said trust estate amounting in value to upwards of \$350,000.00.

(3) Plaintiff Receiver is asking judgment against defendant Trustee of said estate on account of an alleged
41 assessment liability thereon by reason of certain shares of Detroit Bankers Company, all as more particularly set forth in the bill of complaint in this cause.

(4) That said shares of said Detroit Bankers Company were in the control of defendant, either as executor or trustee of said will, during the years 1930 to 1933 inclusive, no part of which shares said defendant sold or disposed of.

(5) Wherefore your petitioner, Cynthia Mills Cleveland, asks leave of this court to intervene in this cause as a party

defendant, to answer the bill of complaint herein and file a counter-claim against the parties hereto as she may be advised; that she have such further order or relief under this petition as may be necessary to fully protect her rights and interests in said trust estate.

CYNTHIA MILLS CLEVELAND.
By: WILLIAM ALFRED LUCKING,
Her Attorney.

LUCKING, VAN AUKEN and SPRAGUE,
Attorneys for Petitioner.

Business Address:
3114 Union Guardian Building,
Detroit, Michigan.

Note: Supporting affidavit is omitted to save space.

42 *Exhibit D*

Filed April 4 1939

In the District Court of the United States
for the Eastern District of Michigan

Southern Division

B. C. Schram, Receiver of First National Bank-Detroit, a National Banking Association,	Plaintiff,	No. 8333 In Equity
v.		
Union Guardian Trust Company, a Michigan corporation, Trustee under the will of Merrill B. Mills, Deceased,	Defendant.]	

*Order Denying the Petition of Cynthia Mills Cleveland
for Leave to Intervene*

At a session of said Court held in the Federal Building
in the City of Detroit, Wayne County, Michigan, on the
31st day of October, A. D. 1938.

Present: The Honorable Arthur J. Tuttle, District Judge.

This matter came on to be heard at this term of Court
upon the petition of Cynthia Mills Cleveland and support-

ing affidavit, for leave to intervene as a party defendant in this cause, and was argued by counsel for petitioner, and for the plaintiff, in this cause, respectively, and the Court having duly considered the matter, and being fully advised in the premises, did order and doth hereby order:

That the petition of Cynthia Mills Cleveland for leave to intervene as a party defendant in this cause be, and the same is, hereby denied.

(Signed) ARTHUR J. TUTTLE,
District Judge.

BIT E"
April 7 1937
 STATEMENT OF CONDITION FIRST NATIONAL BANK-DETROIT
 As of the Close of Business December 31, 1936—Date of Suspension February 11, 1937

33

ASSETS

Assets at date of suspension (book value as reported in Receiver's First Report).....	\$468,615.
Additional Assets acquired since suspension (book value)	32,961.
Stock Assessment (100%).....	25,000.
Total Assets to be Accounted for.....	\$526,576.
Cash collected from Assets.....	\$307,505,136.78
Cash collected from Additional Assets	9,840,254.77
Cash Collected from Stock Assessments	15,626,792.42
Total Cash Collected from Assets and Stock Assessment	\$332,972.
Offset allowed on Assets.....	34,292.
Losses Charged Off:	
On Assets	\$ 14,367,898.22
On Stock Assessment.....	428,655.55
Total Losses Charged Off.....	14,796.
Remaining Assets:	
Uncollected Assets	\$114,188,227.60
Uncollected Additional Assets...	21,382,433.40
Uncollected Stock Assessment...	8,944,552.03
Total Remaining Uncollected Assets.....	144,515.2
Total Assets Accounted For.....	\$526,576.2

RECAPITULATION OF REMAINING ASSETS—
BOOK AND ESTIMATED VALUES

Remaining Assets:	Book Value	Estimated Value
Uncollected Assets (including estimated values of foreclosure bids, etc.)	\$114,188,227.60	\$ 87,842.0
Uncollected Additional Assets...	21,382,433.40	1,167.3
Uncollected Stock Assessment...	8,944,552.03	2,740.9
Total Remaining Assets.....	\$144,515,213.03	\$ 91,750.2

*The above figures as to estimated values represent the Receiver's present estimate of the ultimate liquidation value of these items. Accordingly, these values are not guaranteed by either the Receiver or the Comptroller of the Currency, and they should not be accepted by the depositor as final either as a basis of prospective dividends or otherwise. The assets valued above include those, if any, which have been pledged for the repayment of secured liabilities and no allowance has been made for unpaid balances of such claims or for any outstanding balance of a liquidating loan granted to the receiver by the Manufacturers National Bank of Detroit.

LIABILITIES

Secured Liabilities at date of suspension.....	\$ 43,697,447.69
Unsecured Liabilities at date of suspension.....	371,350,558.17
Additional Liabilities Established.....	2,109,985.10
Total Liabilities This Date.....	\$417,157,990.96
Secured and Preferred Liabilities Paid in Cash.....	\$ 45,169,455.54
(Paid by Conservator \$18,465,823.06)	
Liabilities offset (Unsecured \$34,620,308.90, Secured 0)	34,620,308.90
Unsecured Liabilities for which Receiver's Certificates have been issued.....	335,937,117.05
Unpaid Secured Liabilities (both proved and unproved)	0
Unsecured Liabilities not paid or proved.....	1,431,109.47
Total Liabilities Accounted For.....	\$417,157,990.96

COLLECTIONS AND DISBURSEMENTS

Collections From All Sources:	
Cash collected from assets and stock assessment...	\$332,972,183.97
Cash collected from Interest, Premiums, Rents, etc.	32,800,788.33
Cash collected by Receiver and held as Trustee for Owners	446,099.67
Unpaid Bills Payable, Manufacturers National Bank of Detroit.....	6,500,000.00
Total Collections To Be Accounted For.....	\$372,719,071.97
Disbursements of Every Character:	
Secured and Preferred Liabilities Paid (including Dividends)	\$ 45,169,455.54
(Paid by Conservator \$18,465,823.06)	
Advances in protection of Assets (Taxes, Insurance, etc.)	3,718,410.18
Advances in protection of Assets (Foreclosure Bids, etc.)	33,678,251.59
Interest and Expense Charges by Reconstruction Finance Corp. and Manufacturers National Bank of Detroit	6,489,500.88
Costs of Liquidation (Exclusive of Interest and Expense Charges on Borrowed Money)	10,307,482.10
(Expenses and Advances by Conservator \$441,639.59)	
Dividends Paid to Unsecured Creditors on Unproven Claims	157,346.87
Dividends Paid to Unsecured Creditors (80%)....	271,956,019.20
(Paid by Conservator \$31,577,087.24)	
Cash in hands of Receiver and Comptroller.....	1,242,605.61
Total Collections Accounted For.....	\$372,719,071.97

44

Return on Service of Writ Issued April

4 1939

I hereby certify and return, that on Apr 4 1939 I received the within summons and served the within named defendants.

1. Preston Delano (Comptroller etc.) Personally, April 5, 1939.

2. B. C. Schram (Recr etc.) Not To Be Found, May 3, 1939.

3. Dist. Atty. Personally by serving C. S. Dowrick Sec. Personally, Apr. 5, 1939.

JOHN B. COLPOYS

United States Marshal.

By 1. A. P. HARE

2.

Deputy United States Marshal.

3. JAMES McCARTHY.

45

Amendments to Complaint

Filed May 24 1939

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*

Plaintiff hereby amends her Complaint in this cause by adding thereto paragraphs 26 to 53, both inclusive, as follows:

(26) That at the time of the closing of said First National Bank-Detroit on February 11th, 1933, it had an authorized capital stock issued and outstanding of the total par value of \$25,000,000. and total deposits of \$398,798,006.00.

(27) That at the time of the closing of the Guardian National Bank of Commerce of Detroit in February, 1933, it had an authorized capital stock issued-and outstanding of the total par value of \$10,000,000.00 and total deposits of \$113,866,273.00.

(28) Both of said last mentioned National Banks were in the year 1933 declared by the Comptroller of the Currency to be insolvent within the meaning and intent

46 of the Acts of Congress in such case made and provided; and said Comptroller of the Currency in each instance proceeded to levy a 100 per cent stock assessment against the stockholders of said Banks.

(29) On the said closing of said two National Banks in February, 1933, and the appointment of receivers thereof on or about May 11, 1933, it became and was the particular duty, under the Acts of Congress, of the said Comptroller of the Currency and said two Receivers of said Banks to speedily and economically wind up the affairs of said two National Banks and terminate the said Receiverships in accordance with law.

(30) As to the said Receivership of said Guardian National Bank of Commerce of Detroit, the Comptroller of the Currency and said Bank's Receiver performed said duty as hereinafter set forth.

(31) As to the said Receivership of said First National Bank-Detroit, the Comptroller of the Currency and said Bank's Receiver did not perform said duty, but on the contrary, wilfully breached said duty, all as hereinafter set forth.

(32) The acts and omissions hereinafter complained of were the acts and omissions of the defendant Preston Delano's predecessor in the office of the Comptroller of the Currency, and of the defendant B. C. Schram and his predecessor Receiver of said First National Bank-Detroit; and the said Receiver's acts and omissions were controlled at all times by the said predecessor Comptroller of the Cur-

47 rency, who took office as said Comptroller on or about April 1, 1933 and remained said Comptroller of the Currency until about December 31, 1938.

(33) The present defendants, Preston Delano as Comptroller of the Currency, and B. C. Schram, as said Receiver of said First National Bank-Detroit, are nevertheless accountable for the said acts and omissions hereinafter complained of, and the relief prayed of this Court is the same in all respects as though said predecessor Comptroller of the Currency was still in office as said Comptroller on the filing of this complaint.

(34) It had been the duty and practice of all the various Comptrollers of the Currency since 1863 to speedily and

economically wind up the affairs of closed National Banks and terminate the respective receiverships.

Plaintiff shows in that connection that during the period from 1865 to October 31, 1937, the different Comptrollers of the Currency administered about 2800 National Bank Receiverships and paid an average of 65 per cent of all secured and unsecured claims (deposits) in dividends to the creditors of said 2800 National Banks.

(35) Plaintiff is informed that the experience of the different Comptrollers of the Currency in the handling and closing of different National Bank Receiverships since 1865 has been substantially, as follows:

(a) During the year ended October 31, 1937, 341 National bank receiverships, including 2 District of Columbia State bank receiverships under the supervision of the Comptroller's office, were liquidated and finally closed. This is the greatest number of closings ever effected during a
48 Comptroller's report year. These banks had deposits at failure of \$154,754,207, of which \$113,600,000 or 73.41 per cent was returned to depositors. The total cost of liquidation in these trusts was 6.83 per cent of the collections from assets and stock assessments, including offsets allowed.

(b) Remaining in process of liquidation on October 31, 1937, were 882 national and District of Columbia State bank receiverships. Their total deposits at date of failure were \$1,689,372,000, of which approximately \$1,227,000,000, or 72.63 per cent, had been returned to depositors. Receivers have estimated that additional payments of \$237,527,000, of 14.05 per cent, will be made, bringing the total estimated recoveries to depositors in all the remaining receiverships up to 86.65 per cent.

(c) As of October 31, 1937, the total commitments granted by the Reconstruction Finance Corporation to the receivers of insolvent national banks amounted to \$494,495,500 of which \$389,399,367 was actually loaned. Of this amount, commitments aggregating \$13,669,500 had been granted to 27 receivers during the year ending October 31, 1937. During that year the balance due to the Corporation by all receivers of insolvent national banks declined from \$21,913,601.76 to \$8,900,734.80 and the number of borrowing receiverships declined from 315 to 101.

49 (d) A major problem confronting the Comptroller's office was the disposition of 1,417 national banks with unsecured liabilities of \$1,922,698,738, which were denied licenses to open at the conclusion of the banking holiday. By February 6, 1935, all of these banks had been disposed of, 1,114 having been reorganized under various plans, 290 having been placed in receivership following disapproval of reorganization plans, and 13 having gone into voluntary liquidation. A total of \$1,562,739,935, or 81.28 per cent has been made available to the depositors and creditors of these banks.

(e) To expedite the liquidation of all receivership banks and the payment of dividends to depositors, a Deposit Liquidation Board, of which the Comptroller was a member, was appointed by the President on October 15, 1933. Under the supervision of this Committee, the Reconstruction Finance Corporation made loans to receivers of national banks in the total amount of \$389,399,367, of which \$380,498,632 had been repaid by October 31, 1937. Going banks took over some of these receivership loans from the Reconstruction Finance Corporation, and also made original loans to receivers, the total of all such loans by going banks amounting to \$59,403,686, of which \$53,952,223 had been repaid by October 31, 1937.

(f) During the period from March 16, 1933 to October 31, 1937, 815 receiverships were terminated. Total disbursements to their depositors and other creditors
50 amounted to \$315,943,544, or 79.35 per cent of total liabilities established. This may be compared with the termination of 729 receiverships during the 21 year period from 1912 through 1932, an average of 35 a year.

The total cost of liquidation in all receiverships terminated during the period covered in this summary was 7.13 per cent. In other words, the depositors received over 92½ cents out of every dollar collected.

(36) Plaintiff therefore shows and submits to this Honorable Court that by the years 1934 and 1935, the different Comptrollers of the Currency well knew and understood that the average National Bank Receivership and its handling and administration, was to be considered successful and of advantage to the depositors of said closed National Banks, when:

(a) Its depositors received the equivalent in total dividends from 80 to 85 per cent of their total deposits.

(b) Within three to four years of the closing of the National Bank, and

(c) That this result could frequently be accomplished after the Bank Holiday of March, 1933, by borrowing from the Reconstruction Finance Corporation.

(37) Plaintiff further shows and charges that the Comptroller of the Currency had also by the year 1933, learned by his experience in such matters, that as the age or duration of a National Bank receivership increased, so did the percentage of costs of the liquidation increase, over the early or first years of the receivership.

51 In other words, said Comptroller of the Currency learned through experience in the handling of such closed National Banks in the years leading up to 1934 and 1935, that the percentage of costs of liquidation progressively increased from the date of failure or closing of National Banks to the date of closing or terminating its receivership.

(38) With this general experience and knowledge before the defendant's predecessor Comptroller of the Currency and the said Receivers of said First National Bank-Detroit and said Guardian National Bank of Commerce of Detroit, they proceeded in the years of 1934 to the filing of this complaint—

(a) In the case of the Receivership of the Guardian National Bank of Commerce of Detroit to observe, fulfill and comply with their duty to speedily wind up the affairs of said closed National Bank and terminate its receivership, all as hereinafter set forth, and

(b) In the case of the Receivership of said First National Bank-Detroit, to do just the reverse and to refuse, neglect and wilfully omit to wind up said last mentioned bank and its receivership—all for the purposes and with the results as hereinafter set forth.

(39) In that connection with the allegations and statements set forth in paragraph 38-a hereof and in explanation and detailed statement thereof, plaintiff further shows that—

(a) On or about October 25, 1934 (after about seventeen months of the receivership had elapsed) the then Comp-

52 | troller of the Currency approved and put in
 | force the following plan to complete the liquidation
 of the said Guardian National Bank of Commerce of De-
 troit and to speedily terminate its receivership, as follows:

(1) to pay to 135,000 of said Guardian National Bank of
 Commerce of Detroit depositors (having \$1000 or less on
 deposit in said Bank at its closing in February, 1933) their
 deposits in full—that is one hundred cents on the dollar.

(2) To pay to 7,000 other (and larger) depositors a total
 of eighty-seven cents on the dollar in full settlement of all
 their claims and deposits in or against said Guardian Na-
 tional Bank of Commerce of Detroit.

(3) To permit about 4,000 other (and the largest) de-
 positors in said Guardian National Bank of Commerce of
 Detroit, to take stock in a Liquidation Corporation known
 as Guardian Depositors Corporation, and to waive their
 claims against the Bank's Receiver—and look to certain re-
 maining assets of said bank sold by its Receiver to said
 Liquidating Corporation—all with the approval of the
 United States District Court for the Eastern District of
 Michigan had on or about May 1, 1935.

(4) To permit the stockholders of the said Guardian Na-
 tional Bank of Commerce of Detroit and of the six other
 | smaller National Banks (controlled in effect by said
 53 | Guardian National Bank of Commerce of Detroit)
 | to pay and discharge their entire claimed assessment
 liabilities of \$12,600,000.00 by paying a total sum of about
 \$5,000,000.00 or about forty cents on the dollar of said total
 assessment liabilities.

(5) Said plan was approved by the Comptroller of the
 Currency and as substantially carried out is outlined in Ex-
 hibit A attached hereto.

(b) To put into effect this plan of speedily winding up
 said Guardian National Bank of Commerce of Detroit, the
 said Receiver of said Bank borrowed upwards of \$7,000,-
 000.00 from the Reconstruction Finance Corporation, with
 which to pay those large depositors their final 19 per cent
 dividend in cash, thus completing the 87 per cent final (and
 in full) dividend to them as noted in paragraph (a-2) of
 this paragraph.

(40) Plaintiff further shows and charges unto this Hon-
 orable Court that the foregoing plan of said Comptroller

of the Currency was actually and substantially carried out as above outlined; that all depositors were well satisfied with this winding up and termination of said Guardian National Bank of Commerce of Detroit receivership on or about the first of August, 1935 (about two years and three months after the commencement of said receivership) and that no one has ever complained thereof to this date.

54 That under and by said plan of winding up said Guardian National Bank of Commerce of Detroit receivership, so put in force and carried out by said Comptroller of the Currency as aforesaid, millions of dollars in Receiver's salaries, legal expenses and general expenses were saved to the depositors and stockholders of said Guardian National Bank of Commerce of Detroit, and especially was said plan of advantage to said Bank and its depositors and stockholders because it saved the succeeding years of proportionately increasing Receiver's expenses and fees, which such receivership would have incurred and paid out, had it continued to the filing of this complaint, as has the said Receivership of said First National Bank-Detroit, as hereinafter set forth.

(41) Plaintiff further shows and charges unto this Honorable Court that as hereinafter set forth, defendants Comptroller of the Currency and B. C. Schram, Receiver of said First National Bank-Detroit, could have terminated the receivership of said First National Bank-Detroit and wound up its affairs in the years 1935 and 1936 in substantially the same way and under substantially the same plan as that used in the final liquidation of the Guardian National Bank of Commerce of Detroit.

Upon information, that said Comptroller of the Currency and said Receiver Schram made no effort to do so and have deliberately and steadfastly neglected and refused, from the said year 1935 to the filing of this complaint, to
55 permit, assist in or approve any plan or method for speedily winding up the affairs of said First National Bank-Detroit and terminating its said receivership—

which said acts and omissions have resulted in large sums of money totalling over \$1,150,000.00 belonging to the depositors and stockholders of said First National Bank-Detroit, being used for claimed attorneys' fees and legal expenses of said receivership by defendant Receiver B. C.

Schram and his predecessor Receiver, in the liquidating of said First National Bank-Detroit from its closing in February, 1933, to date—

which sums have actually been paid out or a liability therefor incurred by said Comptroller of the Currency and Receivers, to certain special attorneys (appointed by a previous Comptroller of the Currency) and their associates, and to the Legal Division of the Comptroller of the Currency's office in Washington.

Upon information, that a considerable part of said attorneys fees and legal expenses arises from wholly unnecessary duplication of legal services and advice attempted to be rendered said Receivers of said Bank, by said Legal Division in the Comptroller's office in Washington, on the one hand, and by said Receiver's attorneys in Detroit, Michigan, on the other hand.

(42) That said defendant, Comptroller of the Currency, refuses to divulge to depositors of said First National Bank-Detroit, the amounts and details of said legal fees and expenses, although such information was previously requested by plaintiff in accordance with the letters attached hereto and marked Exhibit B.

56 (43) (a) Said defendants, Comptroller of the Currency and Receiver of said First National Bank-Detroit have never disclosed and made known to plaintiff, and the other general creditors or depositors of said closed First National Bank-Detroit, the itemized, detailed statements of what were the "secured Liabilities" of said First National Bank-Detroit, amounting to \$42,697,447.59 in February, 1933, which said Receiver illegally and without any warrant of law, paid to said secured creditors (depositors) in the years 1933 to 1935, such illegal payments totalling in all the sum of \$45,169,455.54, as shown by Exhibit C hereto attached.

(b) Further in that connection, plaintiff shows and charges that all of said payments of \$45,169,455.54 of said alleged "secured liabilities" were paid contrary to law and that said payments of \$45,169,455.54 operate as a fraud upon the rights of all general depositors of said First National Bank-Detroit, and that an accounting thereof should be had for the benefit of all the general creditors (depositors) of said First National Bank-Detroit.

(c) Plaintiff shows in that regard:

(1) That there was no general Act of Congress, and no general implied power in any National Bank, which gave in the years of 1930 to the closing of the First National Bank-Detroit in February, 1933, any authority, right, privilege or power to said First National Bank-Detroit to pledge any assets to any depositor (either to the State of Michigan, or any municipal subdivision thereof, or any
57 private corporation or individual) unless such pledge or preference was done pursuant to the Act of June 25, 1930, Chap. 604, 46 Stat. at L. 809, U. S. C. title 12, Sec. 90, which provides:

“Any association may, upon the deposit with it of public money of a State or any Political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.”

(2) That by the provisions of Public Acts No. 21 of the Public Acts of 1931 of the State of Michigan (in which State said First National Bank-Detroit was in the years 1930 to 1933 located) as amended by Act 32 of Public Acts of 1932 (Extra Session) of Michigan, it is provided that:

“No bank or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security; Provided, that any bank may when authorized by the written order of the commissioner of the banking department of the State of Michigan, pledge qualified assets of the bank, not exceeding in aggregate value as carried on the books of said bank, an amount equal to its capital stock and surplus, consisting of any of the securities enumerated under paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j-1) and (l) of Section twenty-four of this act, for the purpose of becoming a depository for postal savings or other government funds under the laws of the United States, or for the purpose of becoming a depository for surplus funds belonging to the State of Michigan, or to any city, county, township, village or school district within the state of Michigan. * * *”

(3) Upon information, that no “written order of the Commissioner of the Banking Department of the State of Michigan” was ever made authorizing any pledging of

any assets of said First National Bank-Detroit as collateral security, to any creditor or depositor of said Bank prior to its closing in February, 1933, either as to any of said claimed "secured liabilities" of "\$43,697,447.69 at date of suspension" (see said Receiver's Statement of Condition as of December 31, 1938) or any other liabilities of said National Bank.

(4) That under the principles announced in such decisions as *Texas, etc. R. R. Co. v. Pottorff, Receiver*, 291 U. S. 245; *City of Marion, Illinois, et al. v. Ben Sneed, Receiver*, 291 U. S. 262, and *Lewis v. Deposit Co.*, 292 U. S. 559, and *McClellan v. Chipman*, 164 U. S. 347,

the payments by said Receivers of said First National Bank-Detroit amounting to said \$45,169,455.54 were illegal and twenty percent thereof, together with proper interest, must be accounted for by defendants Comptroller of the Currency and Receiver of said First National Bank-Detroit to the general depositors of said Bank.

(5) Plaintiff is uninformed as to the portions of said "secured liabilities" represented by public or private moneys deposited pursuant to some special Act of Congress, such as postal savings funds. But plaintiff charges that the duty of any depositing agent to take security for any deposit, as permitted or required by some special Act of Congress, cannot over-ride the policy of the State of Michigan requiring all pledges to secure all deposits to be approved by the Commissioner of Banking, and that said Act 32 of the Public Acts of 1932 of Michigan is mandatory.

(44) That it would be a useless and futile effort to make a prior demand upon the said defendants for the information covering the matters specified in paragraphs 18, 19 and 20 of this complaint, and to make a prior demand upon said defendants to bring suit for such portions of said legal expenses and fees and secured liabilities as were unlawfully and improperly paid out by them to third persons.

(45) Upon information, that following the said termination of said Guardian National Bank of Commerce of Detroit receivership, practically the same Committee shown on Exhibit A, in good faith and in proper manner attempted to formulate and put into effect a reasonable, just and equitable plan for winding up the affairs and receiver-

ship of said First National Bank-Detroit, in substantially the same terms and on substantially the same general plan, as the one adopted and put in force by the Comptroller of the Currency in the winding up of the affairs and receivership of said Guardian National Bank of Commerce of Detroit, all as outlined and referred to in paragraphs 38, 39 and 40 of this complaint.

Upon information, that to that end conferences were held, adequate plans drawn and revised, arrangements talked over with the Reconstruction Finance Corporation for the necessary loans of funds upon the remaining assets of said First National Bank-Detroit in the hands of the defendants, Comptroller of the Currency and Receiver of said Bank—

60 and the whole matter of such winding up and prompt termination of said receivership properly taken up with and laid before defendant Comptroller of the Currency's predecessor in office.

(46) Upon information, that instead of meeting with the active co-operation and help of said predecessor Comptroller of the Currency, as was given said Committee in the said winding up in 1935, of said Guardian National Bank of Commerce of Detroit—just the reverse was encountered by said Committee so acting for the depositors of the First National Bank-Detroit in their effort to wind up the receivership, and eliminate further expense thereof to the depositors and stockholders of said First National Bank-Detroit.

Upon information, that no good faith effort was made to co-operate with said Committee by the then Comptroller of the Currency and his advisors in Washington, in order to speedily wind up the affairs of said First National Bank-Detroit and terminate its receivership—as had been the case in said termination of said Guardian National Bank of Commerce of Detroit Receivership in the years 1934 and 1935.

(47) That after the closing of said First National Bank-Detroit, on or about February 11, 1933, the following dividends were paid to its general depositors namely:

On February 16, 1933	5%
On March 13, 1933	5%
On April 12, 1933	30%
On November 30, 1933	10%
On December, , 1934	20%
On May 16, 1938	10%
Total—	80%

61 (48) Upon information, that the then Comptroller of the Currency and said Receiver of said First National Bank-Detroit,

could have without difficulty in the years 1935 and 1936 adopted and put into effect substantially the same plan of speedily winding up the receivership of the First National Bank-Detroit—

as was used to such obvious advantage to the depositors and stockholders of the said Guardian National Bank of Commerce of Detroit.

(49) Plaintiff is not advised and has no detailed knowledge of the dates and amounts of said payments by said defendants and their predecessors in office (as Comptroller of the Currency and Receiver of said First National Bank-Detroit) of said

claimed excessive attorneys' fees and legal expenses, amounting (as plaintiff is informed) to upwards of \$1,150,000.00, and of said

claimed unlawful preferential payment of \$45,169,455.54 (as it totalled on December 31, 1938) and, therefore,

Plaintiff shows that very prompt action is necessary by said defendants to recover the same, in order to avoid the possible defense of the applicable Statutes of Limitations, if the same are any defense to such recoveries.

(50) (a) That attached hereto as Exhibit C is the defendant Receiver's Statement of Condition of said First National Bank-Detroit as of March 31st, 1939, which shows, and Plaintiffs charges the fact to be, that said Receiver has more than sufficient assets of said Bank in his hands,
62 with which to pay and discharge in full all lawful liabilities of said First National Bank-Detroit, together with all lawful interest thereon.

(b) That in that connection, plaintiff shows and charges that upon no legal premise or theory could the total of all

interest, which might be claimed by all unsecured depositors of said First National Bank-Detroit, for the entire period after its closing in February, 1933, exceed in the aggregate the sum of \$10,650,000.00 to date.

(c) That said total possible (claimed) interest arrears or claims of \$10,650,000.00 (to unsecured creditors or general depositors) are partly to be made up (or supplied) by the totals of interest due all "unsecured" depositors, by reason of said unlawful payments by said defendant Receiver of \$45,169,455.54 to the "secured" creditors of said First National Bank-Detroit in the early periods of said Bank's receivership.

(d) Upon information that said last mentioned interest claims against said "secured" creditors, and in favor of the general depositors of said Bank, now amount to at least, the sum of \$3,500,000.00—

although said unsecured depositors are now entitled to recover from said claimed "secured" depositors or creditors but twenty per cent of said total payment of \$45,169,455.54

for the reason that all general depositors have now been paid eighty per cent of their total deposits in said First National Bank-Detroit.

63 (51) Upon information, that by the simplest effort on the part of said defendants Comptroller of the Currency and Receiver, they could speedily arrange for a sufficient loan on said assets of said Bank from the Reconstruction Finance Corporation, with which to pay at once in full all average sized (and less) depositors of said Bank, and

then turn the remaining assets in the hands of said Receiver over to the largest depositors and their committee (after proper indemnity given) upon condition that they pay the final balance of assets remaining to creditors and stockholders according to law.

(52) And plaintiff respectfully asks leave of this Honorable Court to show by proper proof, how simply and effectively and speedily such a winding up of said Receivership can be accomplished, by using the methods and plans, in substance, used by the Comptroller of the Currency, in terminating said Receivership of said Guardian National Bank of Commerce of Detroit in 1935.

And in that connection, Plaintiff shows that about three years ago, all depositors of said First National Bank-Detroit having deposits of \$300.00 or less on the closing of this bank, and numbering in all 384,359 depositors accepted one hundred cents on the dollar on their respective deposits (without any interest) and sold their claims against said Bank and its assets and said Receiver Schram to certain of the larger depositors of said Bank.

64 (53) The amount involved herein is upwards of One Hundred Thousand (\$100,000.00) Dollars.

Wherefore, Plaintiff being without adequate remedy save in this Honorable Court, respectfully asks and demands the following relief:

(a) That defendants appear herein and answer this complaint in accordance with the rules and practices of this Court, answer under oath being hereby expressly waived.

(b) That said defendants, Preston Delano, as Comptroller of the Currency, and said B. C. Schram, as Receiver of First National Bank-Detroit, be temporarily and permanently enjoined from further attempts to collect, or collecting, any claimed assessment liability from the assets of the said trust estate of Merrill B. Mills, Deceased, or any part thereof.

(c) That this Honorable Court decree that any further attempts by the defendants Receiver of said First National Bank-Detroit and the Comptroller of the Currency to collect or enforce against or from the said Mills Trust Estate or its assets, any claimed assessment liability of any kind, are a fraud upon its rights and that the same be enjoined temporarily and permanently by this Court.

(d) That this Court decree that any claims of said Receiver Schram against said Trust Estate are barred by the Statute of Limitations of Michigan.

65 (e) That said defendant Receiver Schram be required to account to this Court and plaintiff for said Receiver's expenses of \$10,000,000.00 and to state the details thereof, item by item, to the end that if said Mills Estate Trust is liable for any part of said asserted assessment liability of \$65,000.00, it may be determined whether any part thereof is deductible on account of excessive over-charges by said Receiver in his legal and administrative expenses, the total of which are now admitted

by said Receiver to exceed \$10,000,000.00, an all time high for National Bank Receiverships.

(f) That said defendants Comptroller of the Currency and Receiver account for all moneys paid out by them, or their predecessor Comptroller of the Currency and Receiver of said First National Bank-Detroit, since May 11, 1933—for

(1) Receiver's fees

(2) Receiver's attorney fees and legal expenses,

(3) Receiver's other expenses,

(4) Expenses of the Legal Division in the office of the Comptroller of the Currency in Washington,

(5) All other expenses in the said last named office or division of the Department of the Treasury of the United States.

(g) That said defendants Comptroller and Receiver be required by the mandatory writ of injunction, preliminary and permanent, to

66 (1) Bring and fully prosecute all proper and adequate actions and suits, in the proper courts having jurisdiction, to recover all unlawful and void payments by said receivers of said First National Bank-Detroit to "secured" creditors or depositors of said Bank.

(2) Bring and fully prosecute all proper and adequate actions and suits, in the proper courts having jurisdiction, to recover all excessive, unwarranted, unnecessary and unlawful attorneys' fees or legal expenses paid out or disbursed in said receivership of said First National Bank-Detroit.

(3) Cease and stop all further payments, or the making of obligations for payments, of any attorneys' fees or legal expenses pertaining to said receivership, unless done under the order of this Court.

(h) That this Court find and determine that said defendants Comptroller of the Currency and Receiver now have sufficient assets on hand with which to pay all lawful remaining liabilities of said First National Bank-Detroit, together with all lawful interest due thereon.

(i) That this Honorable Court proceed to speedily wind up the affairs of said First National Bank-Detroit and terminate said receivership of said Bank, by all proper and necessary orders, writs and judgments, either in this Court

or in such ancillary proceedings in the United States District Court for the Eastern District of Michigan, Southern Division, wherein said First National Bank-Detroit is located, as this Court shall direct.

(j) That plaintiff have such other relief as is necessary to fully, completely and adequately protect the rights and interests of all stockholders of said First National Bank-Detroit.

Dated—May 24th, 1939.

CYNTHIA MILLS CLEVELAND,
By WM. ALFRED LUCKING

Her Attorney in Fact

WM. ALFRED LUCKING
ALBERT W FOX
Attorneys for Plaintiff

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Filed May 24 1939

Exhibit "A"

Outline of Plan

Creditors of this Bank (hereinafter referred to as Guardian Bank") have up to the present time received dividends equal to 68% of their allowed claims. In connection with the payment of the last dividend (8%), certain of the larger depositors consented to the use of their shares of this dividend in such way that all depositors (approximately 135,000) having claims of \$1,000 or less could be paid in full.

At the time this arrangement was made it was proposed to submit a Plan involving the termination of the receivership and the liquidation of the remaining assets of the Bank through a liquidating corporation. The undersigned Committee, serving at the request of the Comptroller of the Currency, has prepared such a Plan and with his approval herewith submits the same.

The Plan contemplates: (a) a settlement of all liability to assessment upon the shares of said Bank; (b) a sale of the Bank's assets under order of a court of competent jurisdiction and with the approval of the Comptroller, at an appraised value, as approved by the Comptroller, to a corporation (referred to as Depositors' Corporation) to be

formed for the purpose of acquiring and liquidating such assets; (c) the assignment to such Corporation by Bank creditors of the unpaid balance of their claims which will be used by such Corporation in acquiring such assets; (d) the issuance of participation certificates to such creditors entitling them to their pro rata share of the liquidation and earnings of such assets; (e) the payment in cash to those creditors electing not to assign their claims of a final dividend representing their prorata share of the amount realized on such sale; and (f) the termination of the Receivership.

After payment of all indebtedness to Reconstruction Finance Corporation, and other indebtedness (if any) incurred by such Corporation, the assets acquired will be liquidated, first, for the benefit of those creditors assigning their claims, until such claims are fully paid, with interest as provided in paragraph 8; second, repayment of the capital of the corporation to those who furnish the same; third, for the reimbursement of those who subscribe and pay into the Settlement Fund to the extent that such amount is paid to the Receiver of the Guardian Bank to discharge stockholders' liability, and finally for distribution of the remainder among the stockholders of the Guardian Bank.

As soon as may be after such sale is completed the Receivership will be terminated. It is the belief of the Committee that this Plan will be beneficial to the depositors and creditors of the bank and to the general business and banking conditions in Detroit.

69 Guardian Bank Earnings Under Receivership:

The Plan affords an opportunity for those who so prefer, to receive in cash their share of the appraised present value of the assets. Such depositors and creditors will receive an additional and final cash dividend of approximately 19%. It is expected that those who are willing to wait until liquidation of these assets, will realize a much larger percentage of their claims—it is hoped, the full amount thereof. Depositors and Creditors of the Guardian Bank whose claims have been allowed are urged to assign the unpaid portion thereof to the Depositors' Corporation. The cash earnings of the Guardian Bank from March 13, 1933, when the Conservator was appointed, until June 30, 1934, were

\$2,297,295.54; the operating expenses were \$1,035,558.69; leaving net cash earnings of \$1,261,736.85. These earnings do not include interest accrued but not collected, of which it is estimated at least \$800,000 will be received. From these accrued earnings should, however, be deducted accrued interest on R. F. C. loans (approximately \$600,000) leaving \$200,000 to be added to the net cash earnings, as shown above. These earnings will decrease as the assets are liquidated but it is believed that the expenses of liquidation will be very greatly reduced.

Plan

Settlement of Stockholders' Liability:

1. It is proposed to raise a fund from the holders of Guardian Group stock which, together with those assessments already collected by the Receiver of the Guardian Bank, and by the Receiver of any of the following banks, from stockholders who agree to said Plan and execute the Waivers referred to in Paragraph No. 4 hereof, will be accepted by the Comptroller in full satisfaction and discharge of all liability for assessment in connection with the Guardian Bank, and the following national banks: Grand Rapids National Bank, Grand Rapids, Michigan; Union & Peoples National Bank, Jackson, Michigan; Capital National Bank, Lansing, Michigan; City National Bank and Trust Company, Niles, Michigan; and National Bank of Ionia, Michigan.

2. The entire amount tentatively fixed by the Comptroller as necessary to effect such settlement is \$5,040,000. When the fund is collected, it will be paid to the Receivers of said banks in proportion to the respective capital of such banks, and the liability of all stockholders of said banks and of the Guardian Detroit Union Group, Inc., and its stockholders for assessment in connection therewith will be settled and released.

3. Subscriptions to this Fund (hereinafter called "Settlement Fund") and the use of the amounts so collected for the purpose aforesaid will be contingent upon the Plan being declared operative by the Committee, and this will in turn depend upon the cooperation given to the Plan by both depositors of the Guardian Bank and by the Group stockholders.

70 4. Those stockholders who have already paid or shall pay their assessments in whole or in part to the Receiver of any of said banks, will be included as subscribers to the Settlement Fund, upon agreeing to waive all rights to a return of said payments reserved under any protest or other document or receipt executed or given in connection with such payments. Directors of any of said Banks who shall have or who shall make payments on account of their assessment liability upon directors qualifying shares, shall also be included as subscribers to said settlement fund upon agreeing to such waiver.

5. In the event that more than the amount required to effect said settlement is subscribed, the excess shall be adjusted among those paying the largest percentage of their total liability so as to equalize as far as may be the payments to said fund:

Assignment of Creditors' Claims

To Depositors' Corporation:

6. A corporation will be formed to be known as "Guardian Depositors' Corporation" (or some other suitable name), hereinafter referred to as "Depositors' Corporation"), having common stock in an amount to be determined by the Committee but not less than \$10,000 nor more than \$50,000, Each Subscriber to the aforesaid Settlement Fund shall be entitled to subscribe for stock in the Depositors' Corporation in the proportion which his subscription bears to the amount paid into said settlement fund, as follows: One share for each \$100 or major part thereof paid by him to the Settlement Fund. The subscription price shall be fixed by the Depositors' Committee at not less than 20 cents, nor more than \$1.00 per share. Shares representing this stock will be issued to Trustees selected in the first instance by the Depositors' Committee.

7. No dividends shall be paid upon said stock until all indebtedness of the Corporation to the Reconstruction Finance Corporation (hereinafter referred to as "R.F.C.") shall have been paid and until the Certificates which will be issued to the depositors shall have been paid in full with interest at 2% per annum from the date of such Certificate.

8. Each creditor who shall assign his claim to such Corporation as herein provided, will receive from the Corporation the obligation of the Corporation in the form of a Par-

Participation Certificate, to pay such depositor, after all other debts of the Corporation shall have been paid, or provided for, his pro rata share of the net proceeds of the liquidation of the assets of such corporation, and of the earnings thereof, until such depositor shall have received an amount equal to the unpaid balance of his claim against the Guardian Bank assigned to such corporation plus interest at the rate of 2% per annum, as aforesaid upon the balance of such claim remaining unpaid from time to time.

71 After payment of such Participation Certificates any further distribution shall be made upon the stock of the Depositors Corporation and shall be redistributed by the Trustees to the subscribers to the capital stock of such corporation pro rata until such subscribers shall have had returned to them the amount of their subscriptions, together with interest thereon at the rate of 5% per annum from the time when such subscriptions were paid; and thereafter, to the subscribers to the Settlement Fund until there shall have been repaid to them the amount of their subscriptions, to the extent that such amount is paid to the Receiver of the Guardian Bank, plus interest at the rate of 5% per annum from the time such subscriptions were paid to the Receiver of the Guardian Bank. Thereafter, all distributions made upon the stock of the Depositors' Corporation shall be redistributed to the stockholders of the Guardian Bank pro rata.

9. The trustees shall hold the stock of the Depositors' Corporation under a voting Trust which shall provide that until the Participation Certificates issued by the Depositors' Corporation shall have been paid in full with interest at the rate of 2% per annum from the date of such Certificate, or until provision for such payment has been made, such stock shall be voted by the Trustees in accordance with instructions of the holders of a majority in amount of such Participation Certificates, for the election of directors, and upon all matters requiring the action of stockholders; but in case of a lump-sum sale of assets, a vote of those holding three-fourths in amount of such Certificates shall be required. A suitable provision granting such voting rights shall be included in the charter of the Corporation. Said Voting Trust shall also provide that after said Participation Certificates shall have been paid with interest as afore-

said, said stock shall be voted by the Trustees for the election of directors and upon all matters requiring stockholders' action, in accordance with the instructions of subscribers to the capital stock of the corporation, until such subscribers shall have been repaid the amount paid on their subscriptions, as aforesaid. In giving such instructions each holder of a Certificate issued to creditors shall be entitled to one vote for each full \$100 of the then unpaid liability represented by his Certificate and each subscriber to the stock of such corporation, to one vote for each share subscribed and paid for by him. The Trustees shall issue to each subscriber to the stock of the Depositors' Corporation a Certificate evidencing such subscriber's right to be repaid the amount of his subscription with interest, as aforesaid, and to each subscriber to the Settlement Fund a certificate evidencing his right of reimbursement, as aforesaid.

Upon the termination of the Voting Trust, if the Corporation shall not have been fully liquidated, the stock of the corporation shall be turned over by the Trustees to the stockholders of the Guardian Bank, subject however to the aforesaid rights of those who furnish the capital of said corporation, and of the subscribers to the Settlement Fund, to be reimbursed as aforesaid out of dividends paid on said stock.

72 10. Depositors and creditors whose claims have been allowed are urged to assign the unpaid portion of their claims against the Guardian Bank to such Corporation. The claims will be used by such Corporation in acquiring the assets of the Bank upon the sale thereof, as hereinafter described.

Sale of Assets:

11. When an amount sufficient to effect the settlement of the stockholders' liability shall have been paid in and when claims of a sufficient amount in the opinion of the Committee and the Comptroller to justify it in declaring the Plan operative have been assigned to the Depositors' Corporation, the amount necessary to effect the settlement will be paid to the Receivers of the various banks upon a sale of all the assets of the Guardian Bank at an appraised value, with the approval of the court of competent jurisdiction.

It is expected that this appraisal will be for an amount sufficient, after deducting the expenses of the Receivership, to pay the unsecured known creditors of the Guardian Bank an additional 19 per cent.

12. The Depositors' Corporation will, upon the sale of the Bank's assets, assume the indebtedness of the Receiver of the Guardian Bank to the R.F.C., and the Receiver will be released from such indebtedness; or the Depositors' Corporation will purchase the Bank's assets subject to a new loan to be made by the R.F.C. to the Depositors' Corporation sufficient in amount to discharge the Receiver's indebtedness to the R.F.C. Such sale will also be made subject to the lien of the R.F.C. and subject to any commitment of the R.F.C. for an amount sufficient in the opinion of the Comptroller to make available cash to discharge, upon the same basis of payment as other creditors in the same class, all unknown and contingent claims against the Bank or the Receiver, when, as, and if such claims shall thereafter be established or settled by the Comptroller and also for an amount sufficient to cover the expenses of the receivership of the Bank. The Depositors' Corporation will contract and agree that the R.F.C. may disburse such loan in accordance with such commitment, such loan to be the indebtedness of the Depositors' Corporation, and to be used by the Comptroller on his order and demand for payment of such contingent, unknown, or unlisted or disputed claims as to the Comptroller may seem proper or which are determined by a court of competent jurisdiction. Any unused portion of such loan shall be repaid to the R.F.C. and credited to the Depositors' Corporation.

13. Creditors who prefer not to assign their claims to the Depositors' Corporation will be entitled, if the Plan becomes operative, to receive their pro rata share of the proceeds of such sale in cash. This will mean that the non-assigning creditors, if the Plan is effective, will receive a final cash dividend of approximately 19 per cent. Payment of this dividend, however, will depend upon the sale of the assets under the Plan; otherwise, dividends will only be paid from time to time by the Receiver in the regular course of his administration as assets are collected and the proceeds distributed over a period of time.

Discharge of the Receiver:

14. When the stockholders' liability shall have been settled and released, and when the sale of the assets of the Bank shall have occurred, as above outlined, and such assets conveyed to the Depositors' Corporation, the Receivership will be terminated as soon as may be. The Receiver will, of course, remain to pay the final dividend and attend to all matters necessary or incident to the closing out of the Receivership and winding up of the affairs of the Bank.

Declaring the Plan Operative:

15. The Plan can only be made effective and such sale can only be accomplished if sufficient creditors assign their claims to the Depositors' Corporation so that they may be used to acquire the assets on such sale and only if sufficient of the stockholders subscribe and pay into the Settlement Fund so that stockholders' liability can be discharged.

The Committee, therefore, will declare the Plan operative, only if a sufficient sum is subscribed and paid into the settlement Fund and if sufficient claims against the Banks are assigned to the Depositors' Corporation as above set forth. If the Plan is not declared operative, or, if it is not made effective, all assignments of claims and subscriptions or payments to the Settlement Fund received by the Committee will be canceled and returned.

16. It will be understood that creditors in assigning their claims, stockholders in subscribing to the Settlement Fund, and subscribers to the stock in the Depositors' Corporation will be deemed to have granted full authority to the Committee to determine any details of said Plan, including the determination of the charter of the Depositors' Corporation, form of certificates to be issued to assigning creditors, form of shares of stock in the Depositors' Corporation, form of Certificates to be issued to subscribers for stock in Depositors' Corporation, certificates to be issued to subscribers to the Settlement Fund, the trust agreement under which the stock in the Depositors' Corporation will be held, and the naming of such Trustees; to do and perform whatever in their judgment may be necessary and proper to carry the same into effect; that said Committee may act by a majority of its members, including the filing of vacan-

cies therein, and that members of said Committee shall be under no liability or responsibility to any party whatsoever except for bad faith.

17. Enclosed herewith please find form to be executed by you and returned in the enclosed envelope.

18. All subscriptions to the Settlement Fund, Consents of Stockholders who have paid their assessments and Assignments of Claims will be held in escrow until the Plan is declared operative and are conditioned upon a sale of the assets at the appraisal above referred to and the settlement of stockholders' liability at an amount not in excess of the amount stated, with court approval, and the approval of all other public authorities whose approval is necessary.

19. Unless otherwise indicated, "Receiver", means Receiver of Guardian Bank; "Bank" means Guardian Bank; "Corporation" means Guardian Depositors' Corporation.

HUGH J. FERRY, *Chairman*
MEYER L. PRENTIS
C. DAVID WIDMAN
HORACE A. DAVIES
B. J. CRAIG
Guardian Depositors'
Committee

Dated: October 25, 1934.

75

Filed May 24 1939

Exhibit "B"

July 12, 1937

Mr. B. C. Schram,
Receiver, First National Bank-Detroit
Detroit, Michigan

Dear Sir:

As a depositor of the First National Bank-Detroit, I would like to be advised of the total legal expenses of the Receivership to July 1st last, particularized so as to inform me of the following items:

(a) General Attorneys' personal charges or remuneration, and whether by periods or by particular cases or suits.

(b) The general Assistants' charges and similar particulars.

(c) General office expenses.

(d) If any of the foregoing is contained in any reports heretofore rendered by the Receiver, please enclose copies thereof and oblige

Yours very truly,

WILLIAM ALFRED LUCKING

WAL/T

Registered

File No. 2356

First National Bank
Detroit

July 16th, 1937

B. C. Schramm,
Receiver

Mr. William Alfred Lucking, Esq.,
3114 Union Guardian Building,
Detroit, Michigan

Dear Sir:

I am in receipt of your letter of the 12th requesting certain detailed information concerning legal and other expenses paid to date by this receivership. In reply, I beg to advise you that the only information I am authorized to furnish to depositors in this connection is that contained in statements of condition of the receivership issued by me and published quarterly. A copy of the current
76 statement for the quarter ending June 30th, 1937, with analysis thereof furnished to the Press, is herewith enclosed.

Additional information, a little more detailed, may be found in the Annual Report to Congress made by the Comptroller of the Currency, copies of which may be obtained by applying to the Superintendent of Documents, Government Printing Office, Washington, D. C.

Yours very truly,

B. C. SCHRAM, *Receiver*

BCS Hr

November 1, 1937

The Honorable,
The Comptroller of the Currency,
Washington, D. C.

Re-Liquidation of First National Bank-Detroit

Dear Sir:

Under date of July 12th last, I wrote the Receiver of the First National Bank-Detroit, for information as to the amount of attorneys' fees paid the Receiver's attorneys, as follows:

"Dear Sir:

As a depositor of the First National Bank-Detroit, I would like to be advised of the total legal expenses of the Receivership to July 1st last, particularized so as to inform me of the following items:

(a) General Attorneys' personal charges or remuneration, and whether by periods or by particular cases or suits.

(b) The general Assistants' charges and similar particulars.

(c) General office expenses.

(d) If any of the foregoing is contained in any reports heretofore rendered by the Receiver, please enclose copies thereof and oblige,"

On July 16th, I have a reply, as follows:

"Dear Sir:

I am in receipt of your letter of the 12th requesting certain detailed information concerning legal and other
77 expenses paid to date by this Receivership. In reply

I beg to advise you that the only information I am authorized to furnish to depositors in this connection is that contained in statements of condition of the receivership issued by me and published quarterly. A copy of the current statement for the quarter ending June 30th, 1937, with analysis thereof furnished to the Press, is herewith enclosed.

Additional information, a little more detailed, may be found in the Annual Report to Congress made by the Comptroller of the Currency copies of which may be obtained by applying to the Superintendent of Documents, Government Printing Office, Washington, D. C."

The statement enclosed me by Mr. Schram did not disclose the legal expenses other than the following item—
“Costs of Liquidation (exclusive of interest and expense charges on borrowed money) \$7,841,103.42”

Will you please advise me at an early date whether this is all the information which a depositor of the First National Bank-Detroit is entitled to receive from its Receiver about the questions asked him by my letter of July 12th.

Thanking you, I am

Respectfully,

WILLIAM ALFRED LUCKING

WAL/T

Treasury Department
Comptroller of the Currency
Washington

November 11, 1937

Mr. William Alfred Lucking,
Lucking, Van Auken and Sprague,
3114 Union Guardian Building,
Detroit, Michigan

In reply,
Please refer to CC-A

Dear Sir:

We have at hand your communication of November 1st in which you incorporated a copy of your letter of July 12th addressed to the receiver of the First National Bank-

78 Detroit, requesting certain detailed information concerning his trust, as well as a copy of his reply on July 16th advising that he was not permitted to supply such data. You now inquire as to whether or not this information can be obtained.

In the receiver's letter you were informed as to the nature of the information which is usually given to the public in connection with the liquidation of insolvent national banks. Our experience has been that no useful purpose is served by the dissemination of detailed information such as that desired by you. On the other hand, it has been found that providing such information to the public tends to hamper the receiver's efforts and liquidation generally.

It has long been contrary to the policy of this office to authorize receivers to comply with such requests for information, and we must therefore state that the position taken by this receiver is correct.

Yours very truly,

WILLIAM PRENTISS, JR.,
Deputy Comptroller

MJ—

79

Filed May 24 1939

Exhibit "C"

Statement of Condition—First National Bank* Detroit

As of the Close of Business March 31, 1939—Date of Suspension, February 11, 1933

Assets

Assets at date of suspension (book value as reported in Receiver's First Report	468,615,208.27
Additional Assets acquired since suspension (book value)	33,090,435.92
Stock Assessment (100%)	25,000,000.00
Total Assets to be accounted for:	526,705,644.19
Cash collected from Assets	310,415,846.59
Cash collected from Additional Assets	9,942,718.90
Cash collected from Stock Assessment	16,118,012.84
Total cash collected from Assets and Stock Assessment	336,476,578.33
Offset allowed on Assets	34,378,435.21
Losses charged off:	
On Assets	14,869,933.10
On Stock Assessment	457,567.76
Total Losses Charged Off:	15,327,500.86

Remaining Assets:

Uncollected Assets	110,756,909.73
Uncollected Additional Assets	21,341,800.66
Uncollected Stock Assessment	8,424,419.40

Total Remaining Uncollected Assets: 140,523,129.79

Total Assets Accounted For: 526,705,644.19

Recapitulation of Remaining Assets—Book and Estimated Values

Remaining Assets:	Book Value	Estimated Value*
Uncollected Assets (including estimated values of foreclosure bids, etc)	110,756,909.73	84,824,497.30
Uncollected Additional Assets	21,341,800.66	1,126,156.27
Uncollected Stock Assessment	8,424,419.40	2,249,754.80
Total Remaining Assets	140,523,129.79	88,200,408.37

*The above figures as to estimated values represent the Receiver's *present* estimate of the ultimate liquidation value of these items. Accordingly, these values are not guaranteed by either the Receiver or the Comptroller of the Currency, and they should not be accepted by the depositor as final either as a basis of prospective dividends or otherwise. The assets valued above include those, if any, which have been pledged for the repayment of secured liabilities and no allowance has been made for unpaid balances of such claims or for any outstanding balance of a liquidating loan granted to the receiver by the Manufacturers National Bank of Detroit.

80 Liabilities

Secured Liabilities at date of suspension	43,697,447.69
Unsecured Liabilities at date of suspension	371,350,558.17
Additional Liabilities established	2,127,625.26

Total Liabilities This Date:	417,175,631.12
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Secured & Preferred Liabilities paid in cash	45,208,916.24
Paid by Conservator \$18,465,823.06)	

Liabilities offset (Unsecured \$34,709,699.57, Secured 0)	34,709,699.57
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Unsecured Liabilities for which Receiver's Certificates have been issued	335,940,279.78
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Unpaid Secured Liabilities (both proved and unproved)	0
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Unsecured Liabilities not paid or proved	1,316,735.53
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Total Liabilities Accounted For:	417,175,631.12
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Collections and Disbursements

Collections From All Sources:

Cash collected from assets & stock assess- ment	336,476,578.33
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Cash collected from interest, premium, rents, etc.	33,884,537.13
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Cash collected by Receiver & held as Trustee for Owners	442,195.31
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Unpaid Bills Payable, Manufacturers Na- tional Bank of Detroit	2,050,000.00
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Total Collections to be Accounted For:	372,853,310.77
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justify this court in setting aside the official and discretionary acts of said Comptroller or of defendant Preston Delano, as his successor, or in intervening in the liquidation and administration of said bank in receivership.

82 2. Plaintiff in said complaint as amended seeks to attack the validity and effect of acts performed by an administrative and executive officer of the federal government within the course of his exclusive official discretion and jurisdiction vested in him by law, which should not be disturbed by this court.

3. The said complaint as amended shows on its face that it constitutes a collateral attack on the validity of the stock assessment levied by the Comptroller of the Currency in the course of his administrative discretion and authority, and shows further that there is now pending in the District Court of the United States for the Eastern District of Michigan, Southern Division, a suit brought by the Receiver against the Union Guardian Trust Company, as trustee of the estate of Merrill B. Mills, deceased, of whom the present plaintiff is the daughter and only heir at law, to recover the assessment liability against the estate, the record owner of the stock in question, and that this plaintiff sought and was denied leave to intervene in those proceedings. The trust company, as the legal representative of the estate and of the plaintiff, may in the Michigan case plead any and all of the alleged defenses to the collection of the stock assessment. A court of equity will not entertain a suit to enjoin the collection of a stock assessment when the alleged defenses thereto may be set up by the shareholder in a pending action brought by the Receiver to enforce the assessment, and said alleged defenses in this case may be pleaded by the trust company, as the legal representative of the estate, in the Michigan action seeking to enforce the assessment.

Under U. S. C. title 12, sec. 66, the liability for assessment is imposed upon the trustee of an estate and the trustee is the one who should properly defend against the assessment. Plaintiff does not show in her bill of complaint that the Union Guardian Trust Company is not properly
83 defending or will not properly defend against the suit filed by Receiver Schram in Detroit to collect the assessment (referred to in plaintiff's bill of com-

plaint), and hence under these conditions plaintiff is not entitled to maintain the present suit in this jurisdiction.

4. Plaintiff under the averments and allegations in said bill of complaint as amended is not entitled to and shows no lawful grounds for an accounting from the Comptroller of the Currency as to the expenses of liquidation and administration of the affairs of said bank in receivership, and is not entitled to the injunctive relief prayed for.

5. The question of whether the Comptroller of the Currency shall approve a plan to wind up the affairs of a national bank in receivership by the sale in bulk of the remaining assets of said receivership, or whether he shall wind up the affairs of such receivership in orderly liquidation over a period of time, is a matter vested solely in the discretion and judgment of the Comptroller of the Currency, and the court will not substitute its judgment, or the judgment of the plaintiff, for and in place of the official and administrative discretion and judgment of the Comptroller of the Currency.

6. The issues and contentions raised by plaintiff in said complaint as amended, concerning the payment of interest to the depositors of said bank, are irrelevant matters of inquiry at this time, and said issues and contentions are prematurely raised, in that plaintiff shows, in said complaint as amended, that the depositors and creditors of said bank have not yet been paid in full the respective amounts of principal due them, in that they have only been paid 80 per cent on account of said principal amounts, and hence, the question of the legality or propriety of the payment of interest to said depositors will not become a justiciable issue unless and until said depositors and other creditors have been paid the full amount of the principal of their respective claims, or until plaintiff has shown, by adequate and sufficient allegations of fact, that said depositors are about to be paid not only the remaining amount of the principal of their claims, but in addition thereto interest thereon.

The Receiver's Statements of Condition of First
84 National Bank-Detroit constituting Exhibit C attached to the original bill of complaint, and Exhibit C attached to the amendments of the bill of complaint, cannot legally be taken to reflect actual value of the assets but merely the Receiver's estimate of ultimate liquidation value as indicated by his explanatory note appearing on the bot-

tom of said statement. Whether the asset will ultimately yield the then estimated proceeds can only be determined at the end of the period of liquidation of said assets. The liquidation of the assets of said bank and the distribution of the same to the depositors and creditors of the bank, and the administration of the affairs of the receivership, are matters which are vested by law in the sole discretion and judgment of the Comptroller of the Currency and the court will not substitute its judgment, or the judgment of plaintiff, for and in place of the judgment and discretion of the Comptroller, and furthermore, the Comptroller's action taken in the course of exercise of said discretion and judgment will not be questioned or interfered with by the courts in the absence of a showing of personal bad faith or fraud on the part of the Comptroller.

7. Plaintiff had not, prior to the filing of said complaint, made any demand upon, or submitted any request to, the Comptroller of the Currency, for information as to the alleged secured and preferred claims averred by complaint to have been illegally paid by the Comptroller or his predecessors in office, and further, said bill of complaint asserts no facts showing or establishing that the alleged payments of said alleged secured and preferred claims were illegally made by defendant or his predecessors in office.

8. Plaintiff in said complaint as amended makes no allegations or averments of fact showing that defendant Preston Delano or his predecessors in office have been
85 guilty of bad faith or personal fraud in the course of the exercise of their duties as Comptrollers of the Currency in the administration and liquidation of the affairs of said receivership bank.

9. The allegations of the bill of complaint as amended respecting the alleged negligence of the Union Guardian Trust Company in the conduct of the affairs of the trust estate, of which the plaintiff is the chief beneficiary, are not proper matters to be determined in a suit to enjoin the enforcement of a stock assessment liability, and it is admitted on the face of the bill of complaint as amended that the trust estate was the owner of the 3881 shares of Detroit Bankers Company stock at the time of the suspension of the bank in February, 1933. Consequently under *Barbour v. Thomas*, (C. C. A. 6th, 1936) 86 F. (2d) 510, 515, 516, the estate is liable for the assessment. The Union Guardian

Trust Company is not named as a party defendant, and the bill of complaint shows on its face that there is now pending in the United States District Court for the Eastern District of Michigan, a suit brought by plaintiff against the Union Guardian Trust Company and B. C. Schram, Receiver, which is based upon the alleged negligence of the trustee. Furthermore, the manner in which the stock was acquired by the trustee cannot be asserted as a defense in a suit to enforce the stock assessment thereon.

10. Defendant Preston Delano as Comptroller of the Currency is not accountable for, and plaintiff is not entitled to any relief against said defendant, concerning or in connection with, the alleged acts or omissions of defendant's predecessors in office, referred to in the bill of complaint as amended.

Signed: GEORGE P. BARSE

Attorney for Defendant, Preston Delano, Comptroller of the Currency

86

Order Granting Motion to Dismiss

Filed December 21 1939

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This cause came on to be heard upon the motion of defendant, Preston Delano, as Comptroller of the Currency, to dismiss the bill of complaint as amended filed herein, and upon consideration thereof after argument in open court it is this 21st day of December, 1939

ORDERED, ADJUDGED AND DECREED that the motion to dismiss said bill of complaint as amended is hereby sustained and said bill of complaint be, and the same is hereby dismissed.

(Sgd) ALFRED A. WHEAT

Chief Justice

No objection as to form:

(Sgd) ALBERT W. FOX

Attorney for Plaintiff.

87 *Notice of Appeal*

Filed January 22 1940

* * *

Notice is Hereby Given that Cynthia Mills Cleveland, Plaintiff in the above entitled cause, does hereby appeal to the United States Court of Appeals for the District of Columbia, from the judgment and order dismissing the cause entered December 21, 1939.

Dated—January 19th, 1940.

ALBERT W. FOX

Attorney for Plaintiff.

88 Filed January 22 1940

Notification of the Filing of Notice of Appeal

To: Preston Delano, Comptroller of the Currency and B. C. Schram, Receiver of First National Bank-Detroit:

Please Take Notice that hereto attached is a true copy of a Notice of Appeal filed in this cause on the 22nd day of January, 1940, by Cynthia Mills Cleveland, to the United States Court of Appeals for the District of Columbia, from the Judgment and Order entered herein on to-wit, December 21, 1939.

Dated—Washington, D. C. January —, 1940.

CHARLES E. STEWART

*Clerk of said United States
District Court*

By ANDREW A. HORNER,

Asst Clerk

Memorandum

January 22 - 1940.

Cost Bond on appeal (\$250.00)—filed.

89

Appellant's Points on Appeal

Filed February 5 1940

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Plaintiff and Appellant, Cynthia Mills Cleveland, herewith files her statement of the points on which she intends to rely on this appeal, and says:

I. That this District Court erred in dismissing plaintiffs complaint as amended.

II. That this District Court erred in not granting Plaintiff the full relief as prayed for.

III. That this District Court erred in not permitting full proofs to be taken in support of the allegations of said complaint, as amended, to the end that said court might and should fully and finally determine on the merits, the following questions and issues raised by said complaint, as amended, namely:

(a) Whether the defendant, B. C. Schram, as Receiver, was properly before this Court—and if not—then whether this Court should have dismissed the complaint as amended, without prejudice.

(b) Whether said Receiver, Schram's assessment claims against the Estate of Merrill B. Mills were barred by the Statute of Limitations of Michigan.

(c) Whether said Receiver, Schram, was accountable to Plaintiff or for her benefit, as asked for in prayer (c) of the complaint.

(d) Whether said Receiver Schram and the Comptroller of the Currency should not be enjoined, as prayed for.

IV. The defendant, Comptroller of the Currency, has misled the Plaintiff and her counsel in Detroit, William Alfred Lucking, (and many other stockholders of First National Bank-Detroit) by repeatedly taking the position and contending in different actions begun by said stockholders in the District Court of the United States for the Eastern District of Michigan, that he, said Comptroller of the Currency, could not be brought into said last named District Court—and, that therefore, in order for any determination of the questions raised in such suits to be made—suits must be brought in this District Court for the District of Columbia in order to obtain jurisdiction over said Comptroller of the Currency.

91 If such is not the law of this case and the issues raised therein—then Appellant asks that this cause be now dismissed without prejudice—so she can raise these issues in a proper suit in said District Court in Michigan against both defendant, Comptroller of the Currency, and said B. C. Schram, as said Receiver—for said Receiver now takes the position in this cause—and also in Civil Cause No. 2563, known as *Lucking v Delano, et. al.* in this Court—that he is not within the jurisdiction of this District Court for the District of Columbia.

For an illustrative example of this practice and device of the Comptroller of the Currency and his said receiver of First National Bank-Detroit, to

(a) Have said Comptroller keep out of the District Courts of Michigan, where said First National Bank-Detroit and said Receiver thereof, B. C. Schram, are residents, and

(b) Have said Bank and Receiver keep out of this District Court of Columbia, where said Comptroller of the Currency is a party—and then

(c) Have said Receiver contend in the said District Court for the Eastern District of Michigan that questions raised, and the relief asked for, in said suits against him cannot be decided or granted by said last named Court—because said Comptroller of the Currency is not a party to said suits in said Eastern District of Michigan—

92 and, therefore, a collateral attack is being made upon the orders of said Comptroller of the Currency;

this Appellant respectfully refers this Court to the Complaint filed in *Lucking and Holmes vs Comptroller of the Currency and said Receiver and Bank*, now pending in said Eastern District of Michigan United States District Court, and known as Civil Cause No. 1603—and particularly paragraphs 51 to 54 (both inclusive) thereof.

V. The final judgment and order of this District Court of December 21, 1939, is erroneous for other reasons and upon other grounds, appearing on the record of this cause.

Respectfully submitted,

ALBERT W. FOX

*Attorney for said Appellant,
Cynthia Mills Cleveland*

93 *Designation of Contents of Record on Appeal*

Filed January 22 1940

* * *

Cynthia Mills Cleveland, Plaintiff herein, by Lucking, Van Auken and Sprague, her attorneys, makes the following designation of contents of record on appeal herein, namely:

- (1) Complaint, as amended
- (2) Defendant, Preston Delano, Comptroller of the Currency's motion to dismiss
- (3) Judgment and Order of December 21, 1939 dismissing said complaint, as amended.
- (4) Plaintiff's notice of appeal.
- (5) Notification of filing of notice of appeal.
- 94 (6) Designation of Contents of Record on Appeal.
- (7) Bond on Appeal.

Dated—January 19th, 1940.

ALBERT W. FOX
Attorney for Plaintiff

95 *Counter-Designation of Record on Appeal*

Filed February 5 1940

* * *

Preston Delano, as Comptroller of the Currency, Defendant-Appellee herein, by his counsel, makes the following counter-designation of contents of record on appeal, namely:

1. Return as to service of process by United States Marshal upon Defendant, B. C. Schram, Receiver of First National Bank-Detroit.

(Signed) GEORGE P. BARSE
*Attorney for Preston Delano,
Comptroller of the Currency.*

Dated:

February 5, 1940.

Service acknowledged Feb 5 1940

ALBERT W. FOX
*Attorney for Cynthia Mills
Cleveland*

96 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia. ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 95, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 2295 Civil Action, wherein Cynthia Mills Cleveland is Plaintiff and Preston Delano, Comptroller of the Currency, et al., are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of February, 1940.

CHARLES E STEWART

(Seal)

Clerk.

By CHAS B COFLIN

Assistant Clerk.

Endorsed on Cover: No. 7614. Cynthia Mills Cleveland, Appellant, vs. Preston Delano, Comptroller of the Currency. United States Court of Appeals for the District of Columbia Filed Feb 26 1940 Joseph W. Stewart, Clerk.

United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7614.

CYNTHIA MILLS CLEVELAND,
APPELLANT,

VS.

PRESTON DELANO, COMPTROLLER OF THE
CURRENCY,
APPELLEE.

BRIEF FOR APPELLANT.

ALBERT W. FOX,
WILLIAM ALFRED LUCKING,
Attorneys for Appellant.

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7614.

Special Calendar.

CYNTHIA MILLS CLEVELAND,
APPELLANT,

vs.

PRESTON DELANO, Comptroller of the Currency,
and B. C. SCHRAM, Receiver of FIRST NA-
TIONAL BANK-DETROIT, and FIRST
NATIONAL BANK-DETROIT,
APPELLEES.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANT.

This is an appeal from the judgment and order of the District Court of the United States for the District of Columbia entered December 21, 1939 dismissing the amended complaint.

Jurisdictional Statement.

Jurisdiction of this Honorable Court of Appeals, and of the District Court, depends upon—

(1) The residence of the Comptroller of the Currency in this District.

(2) The statutory duty of said Comptroller of the Currency to require the Receiver of the First National Bank-Detroit (appointed by him on May 11, 1933) to "proceed to close up such association", promptly and without undue delay and waste.

See Sec. 191 of 12 U. S. C. A. and other applicable statutes.

(3) The general power of a Court of Equity to require the

(a) due and proper administration of a trust estate, and

(b) a proper accounting by a trustee or receiver, whether appointed under statute or by order of court.

(c) to restrain the taking of inconsistent positions by defendant Comptroller—and to protect Plaintiff's right to defend her Estate by pleading the Michigan Statute of Limitations, etc.

Outline of Controlling Facts.

I. Plaintiff is the sole heir at law of Merrill B. Mills, who died a resident of Detroit, in June, 1929.

His estate is in the hands of the Union Guardian Trust Company, as Trustee under his will.
(R. 14.)

II. Plaintiff—for the reasons stated in paragraph 4 to 15 of her complaint, (R. 3 to 9) claims her father's estate is not liable to pay the receiver of First National Bank-Detroit the sum of upwards of \$65,000 as a claimed assessment liability—

on account of certain shares of said bank having been unlawfully retained by said trustee—and the further reason that said Receiver's claims are outlawed by the Michigan Statutes of Limitations.

See Complaint, paragraphs 14 and 19. (R. 8, 10.)

III. Defendant herein Comptroller of the Currency, seeks to prevent a decision of defendant estate's defenses on the merits, in said Michigan District Court, by

(1) directing his said Receiver to proceed to collect said assessment liability from plaintiff's father's estate—and

(2) moving to quash service of process upon him, said Comptroller, and refusing to appear therein—but at the same time instructing and permitting his Receiver to appear in said Court and defend on the ground that said Comptroller of the Currency was not a party to said Michigan litigation.

IV. In that connection—in the cases of said First National Bank Receiver Schram v. Frank Wolf and Margaret Holmes Davis—judgment was entered against them (on the same stock assessment liability) by said Michigan District Court—

when they sought to defend on the same ground of Statute of Limitations—

but the Circuit Court of Appeals of the Sixth Circuit put its decision upon the ground that the Comptroller of the Currency was not a party before said Michigan District Court.

These Wolf and Davis cases are Docket Numbers 8290 and 8291 in said Sixth Circuit Court of Appeals, and the judgment order entered in each of said cases by the Court of Appeals was as follows:

“Before Hicks, Allen and Arant.

This case came on for hearing upon the record, briefs and arguments of counsel, and it appearing that it arises out of the same state of facts as *Barbour v. Thomas*, 86 F. (2d) 510, a class suit decided by this Court; and it appearing that a motion that the Comptroller of the Currency of the United States be made a party to this suit was denied and no appeal taken therefrom:

It is ordered and adjudged that the order and judgment of the District Court be affirmed.

Approved for entry:

H. W. ARANT,

United States Circuit Judge

Filed: March 14, 1940.”

V. And the Collection of an assessment liability of \$65,000 from Plaintiff's (Father's) Estate would defraud her in that:

The proceeds would merely be used to enhance and add to the excessive Receiver's and Attorneys' fees of said Receiver of First National Bank-Detroit—totalling upwards of \$10,000,000 on December 31, 1938 and the details of which the Receiver keeps secret.

(Complaint, pars. 17, 18), (R. 9, 10).

VI. The Receiver now has on hand assets, worth in actual value a sum greatly in excess of any and all lawful sums still owing the creditors of said Bank. Par. 17-a (R. 10.)

VII. Upon the facts and for the reasons set forth in paragraphs 26 to 40 of the Complaint—the said Receivership of First National Bank-Detroit could and should have been terminated in 1935 and 1936, as was the companion receivership of Guardian National Bank of Commerce of Detroit—(as set forth on pages 35 to 41 of the Record).

Outline of Questions for Decision.

FIRST:

Should the Lower Court have made proper findings of ultimate facts?

SECOND:

May a Court of Equity—for good cause—terminate a seven-year-old National Bank Receivership?

THIRD:

May this Court (having the Comptroller of the Currency before it) apply the Statute of Limitations of Michigan against a National Bank Receiver of a closed National Bank located in Detroit—

when the Receiver, in the District Courts of Michigan, defends on the ground that the Comptroller is not a party in the Michigan District Courts—and

the Comptroller of the Currency denies Plaintiff's right to join him as a defendant in the Michigan District Courts?

FOURTH:

May this Court enjoin the Comptroller from enforcing the stock assessment liability of upwards of \$65,000 against the plaintiff's father's Mills Estate—until the Comptroller of the Currency enters his appearance in the actions brought in Michigan against his National Bank Receiver—

and until they are tried on the merits—with the Comptroller of the Currency, a party duly appearing in said Michigan District Court?

Appellant's Statement of Case.

I. Plaintiff, Cynthia Mills Cleveland, filed her complaint on April 4, 1939, against defendant, Preston Delano, Comptroller of the Currency and B. C. Schram, Receiver of First National Bank-Detroit. (R. 1.)

II. On November 6, 1939, defendant, Comptroller of the Currency moved to dismiss the complaint on the grounds:

(1) That the Comptroller levied the stock assessment in accordance with law—and the Court had no jurisdiction to set the assessment aside—or to interfere in the administration of a National Bank Receivership. (R. 65, 66.)

(2) Same.

(3) That the amended complaint is a collateral attack on the stock assessment—

and the Union Guardian Trust Company of Detroit, Michigan, as trustee of the Mills' Estate—can defend in the pending suit in Michigan brought by the Receiver to collect the assessment—and

raise all the alleged defenses to the stock assessment. (R. 66.)

(4) Plaintiff is not entitled to any accounting from the Comptroller as to the expenses of liquidation of the First National Bank-Detroit now in receivership. (R. 67.)

(5) The Court will not substitute its discretion for that of the Comptroller as to the manner, time and method of terminating the receivership. (R. 67.)

(6) Same.

(7) That Plaintiff made no request for information as to the alleged secured claims illegally paid by the Comptroller. (R. 68.)

(8) That no allegations of bad faith or personal fraud are made against the Comptroller. (R. 68.)

(9) That Plaintiff has sued the Receiver and the Trustee under her father's will in the District Court of Michigan—setting up the alleged negligence of the trustee in acquiring the shares in the First National Bank-Detroit—but that the manner in which the Trustee acquired the stock cannot afford a defense to the receiver's suit to enforce the stock assessment. (R. 69.)

(10) That the present Comptroller is not accountable for the acts of his predecessor in office. (R. 69.)

III. On December 21, 1939, Hon. Alfred A. Wheat, sitting in the District Court of the United States for the District of Columbia, dismissed the complaint as amended, without finding of facts or opinion or reasons for such dismissal. (R. 69.)

IV. On January 22, 1940, plaintiff appealed and filed her points on appeal on February 5, 1940. (R. 70, 71.)

V. Statement of Plaintiff's Amended Complaint (R. 1 to 65) admitted by motion to dismiss—

(Paragraphs 1 to 3) Plaintiff, a citizen of California, is sole heir of her father, Merrill B. Mills, who died in June, 1929, leaving a last will of which Union Guardian Trust Company of Detroit, is trustee— (R. 2)

Defendants Delano and Schram are the Comptroller of the Currency and Receiver of First National Bank-Detroit, closed in 1933 and defendant Bank is a National Banking Corporation located in Detroit, Michigan. (R. 2, 3.)

(Paragraphs 4 to 10 inclusive) That the Mills Estate is in charge of Union Guardian Trust Company of Detroit as trustee (subsequent to 1929) and plaintiff as sole heir at law was inexperienced in all matters pertaining to estate. (R. 3.)

That it was the duty of said Trustee under the will, to have sold the estate's bank shares of a market value exceeding \$500,000 in the Spring of 1930; said Trustee exchanged them for shares in the Detroit Bankers Company unlawfully and illegally and subjected said estate to an assessment liability in 1933 of upwards of \$65,000, on the theory that said Detroit Bankers Company shares were, in effect, shares in First National Bank-Detroit, which closed in February, 1933. (R. 3-6.)

(Paragraph 11) (R. 6) That Receiver of said Bank brought suit against the said Trustee to collect said assessment in Equity File No. 8333 in the

District Court for the Eastern District of Michigan. Plaintiff moved for leave to intervene and said intervention was denied as per exhibits C and D. (Record 30, 31.)

(Paragraphs 12 to 16 inclusive) (R. 7-9) That plaintiff thereupon filed her complaint against said receiver and said trustee under her father's will, on February 14, 1939, and attempted to make the defendant, Comptroller of the Currency a party thereto and thus obtain an adjudication of the questions raised; but the said Comptroller evaded jurisdiction of said Michigan District Court and directed his Receiver to appear in said cause and move its dismissal on the ground that the Comptroller of the Currency was not a party thereto and, therefore, the issues could not be adjudicated in said Michigan District Court.

That by this device Comptroller of the Currency seeks to have his Receiver collect an assessment from said Mills Estate of \$65,000 but at the same time avoid any judicial determination of the defenses raised by the plaintiff heir at law.

See the said defenses listed on page 8 of the Record.

(Paragraphs 17, 18) (R. 9-10) That defendant Receiver is attempting to collect said assessment liability from said Trustee of said Mills' Estate—although all creditors have been paid eighty cents on the dollar of their total claims and the last Receiver's statement shows assets sufficient to pay all remaining claims without collecting the assessment from said Mills Estate.

(Paragraphs 19 and 20) (R. 10-11) That the attempt to collect the assessment liability from said Mills Estate is merely for the purpose of pay-

ing interest as damages for the detention of said deposits after the closing of said bank and as such claim is obviously, for "injuries" to property and, therefore, must be brought within three years from July 31, 1933 under the Statute of Limitations of Michigan, and said action of said Receiver not having been so brought is outlawed.

(Paragraphs 21 and 22) (R. 11-12) That the only object or aim to be gained by enforcing said assessment liability against said Mills Estate is to further add to excessive Receivers' and Attorneys' fees and expenses, the amounts of which are now concealed from all stockholders of said Bank.

That the enforcement of said assessment liability would work a great hardship upon the Mills Estate under the present income tax laws, etc.

(Paragraph 23) (R. 12-13) That said Receiver defends said Michigan action brought by plaintiff on the ground that it is a collateral attack upon the Comptroller of the Currency and that he is not a party to the District Court case and that the issues and defenses of the Mills Estate case raised by plaintiff cannot be tried and determined by the Michigan District Court. That this dilatory defense, in view of the fact that plaintiff has attempted to make said Comptroller of the Currency a party defendant in the said Michigan Courts, operates as a fraud upon her rights and deprives her of her property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

(Paragraph 24) (R. 13) That the complaint is filed on behalf of other stockholders similarly situated.

(Paragraphs 26 to 37 inclusive) (R. 35-39) That for the reasons and details and facts stated, it is the duty of the defendants, Comptroller of the Currency and the Receiver of said Bank to terminate said receivership and they refuse to do so, although under the facts stated, it is their duty under the Acts of Congress to speedily wind up the affairs of the said First National Bank-Detroit.

(Paragraphs 38 to 40) (R. 39-41) That pursuant to the said duty to speedily terminate the affairs of a National Bank receivership the defendants terminated the Receivership of the Guardian National Bank of Commerce of Detroit in the years 1935 to 1936, as set forth in said paragraphs; that said termination has been fully carried out to the complete satisfaction of all creditors and others interested in said Guardian Bank.

(Paragraphs 41, 42) (R. 41-42) That the affairs of the receivership of First National Bank-Detroit could have been similarly terminated and wound up in the years 1936, but the defendants refused so to do, thus causing the stockholders of said Bank the loss of several million dollars and unnecessary legal fees and expenses of said receivership since 1936, the amount of which legal fees and disbursements the defendant Comptroller of the Currency refused to divulge to the depositors and stockholders of said Bank.

(Paragraphs 43, 44) (R. 42-44) That the Receiver of First National Bank-Detroit has paid out upwards of \$40,000,000 in unlawful preferences and should account for such payments.

(Paragraphs 45, 46) (R. 44-45) That the Comptroller of the Currency in the years 1936 to the

filing of the complaint, made no good faith effort to co-operate with the depositors of said First National Bank-Detroit, in their efforts to terminate said Receivership as had been satisfactorily done with the receivership of the Guardian National Bank of Commerce of Detroit.

(Paragraphs 47 to 49) (R. 45-46) That the Receiver has already paid 80% of all claims of all general creditors by May 16, 1938 and could have, without difficulty in the year 1936, have terminated the said receivership as was done to the obvious advantage of the depositors and stockholders of the Guardian National Bank of Commerce of Detroit. That said defendants refused any information as to attorneys fees and legal expenses already paid by said Receiver.

(Paragraph 50) (R. 46-47) That by Exhibit C, Receiver's statement of condition of said Bank as of March 31, 1939, it appears that said Receiver has sufficient assets in his hands to pay and discharge all lawful liabilities of said bank, together with all lawful interest. Therefore, no necessity exists for collecting the assessment in the Mills Estate.

(Paragraph 51, 52) (R. 47-48) That the defendants can easily pay the balance due on average-sized and less depositors of said bank and turn the balance of the unsold assets over to the larger depositors and their Committee as was done in the case of the receivership of said Guardian National Bank of Commerce of Detroit in the year 1935. That all deposits in said First National Bank-Detroit of \$300.00 and less and numbering 384, 359 have been paid in full, one hundred cents on the dollar.

(Paragraph 53) (R. 48-50) Prayers for relief—namely (1) that the defendants be restrained from unnecessarily collecting the assessment liability from the Mills Estate; that (2) the Receiver's action is outlawed by the Michigan Statute of Limitations, and (3) the defendants account for the heavy expenses of said receivership and be required to terminate said receivership under the direction of this Court.

ARGUMENT BY APPELLANT.

Point I.

This complaint raises meritorious questions and issues upon which the Lower Court should have made proper findings of ultimate facts.

The rule announced by this Honorable Court in *Boos v. Hardee*, 68 App. D. C. 77, 92 Fed. (2) 234 might well be applied to the case at bar.

For this Court in its opinion in *Boos v. Hardee*, *supra*, cited such decisions as *Edwards v. Holland Banking Company*, 75 Fed. (2d) 712 (8 C. C. A.).

In *Edwards v. Holland Banking Company*, *supra*, a claim for legal services against a National Bank Receiver was dismissed, without special findings of fact and separate conclusions of law.

The Eighth Circuit Court of Appeals held the cause should be remanded to the Lower Court to make "com-

plete findings and conclusions of law as directed by Equity Rule 70½”.

And see *Clarke v. Gold Dust Corporation*, 91 Fed. (2d) 12 where the Third Circuit Court of Appeals reversed an order of the Lower Court dismissing an amended bill of complaint, because the District Court had made no findings of facts and conclusions of law.

In *Gibbs v. Buck*, decided April 17, 1939, 307 U. S. 66-99; 83 L. Ed. 1111, Justice Reed dealt with the necessity of findings of fact and conclusions of law in an injunction suit decided on the pleadings. In this case the findings of fact and conclusions of law were filed after the Court's order and decree.

“Better practice dictates the findings of fact and conclusions of law before or contemporaneously with the order or decree,” the Court said.

In the case at bar no findings of fact or conclusions of law have been filed at any time.

Interstate Circuit vs. U. S., 304 U. S. 55, 58;
82 L. Ed. 1146.

The Supreme Court of the United States in a *per curiam* opinion set aside the decree and remanded the case, quoting Equity Rule 70½ stating:

“The District Court did not comply with this rule. The Court made no formal findings.”

In *Brown v. Metropolitan Life Insurance Co.*, 69 App. D. C. 233, 100 Fed. (2) 98, this Honorable Court in a *per curiam* opinion held that a memorandum opin-

ion in the Lower Court enabled the reviewing Court to know the basis of the Trial Court's determination. In *Interstate Circuit vs. U. S.*, *supra*, the Supreme Court held "that the opinion of the Court was not a substitute for the required findings." The Record of the case at bar contains no memorandum opinion.

And this Honorable Court followed its ruling in *Boos v. Hardee*, *supra*, in the later cases of:

Heitmeyer v. Federal Commission, 68 App. D. C. 180, 95 Fed. (2) 91.

Societe, etc. v. Cummings, 69 App. D. C. 154, 99 Fed. (2d) 389.

Point II.

The Rule of this Court, in effect, is that if a National Bank Receiver has sufficient assets on hand, with which to satisfy all creditors—the receivership may be terminated by proper application to a Court of Equity. Plaintiff offers to prove (R. 9-10) that the Receiver has sufficient assets on hand.

On motion to dismiss complaint which seeks to enjoin collection of claimed assessment against National Bank stockholders, the allegation of complaint must be construed in light most favorable to plaintiffs.

Abel, *et al.* v. Munro, *et al.*, 110 Fed. (2nd) 647.

This was an appeal from the District Court of the United States for the Eastern District of New York and Circuit Judge Augustus N. Hand quoted the opin-

ion of the United States Supreme Court in *Adams vs. Nagle*, 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999. He said: "We think that the amended complaint contains allegations under which such a fraud appears to be claimed as a basis for avoiding assessment by the Comptroller. However unlikely or even fantastic such allegations against the Comptroller may appear to be, cannot say from the mere inspection of the pleadings that the plaintiffs are not entitled to try to establish the allegations they have made and should be deprived of their day in Court." The Lower Court's ruling dismissing the complaint was reversed.

The Supreme Court of the United States, Mr. Justice Roberts rendering the Court's opinion, in *Adams v. Nagle, supra*, pointed out that a number of the Federal Courts have said that while an assessment may not be collaterally attacked, it may be voided by direct attack for "clear error of law, fraud or mistake." Other Courts have said that the only ground of successful attack is fraud on the part of the Comptroller. Plaintiff charges that it would operate as a fraud upon her rights for the Comptroller to now levy any assessment of any amount in order to pay the present liabilities of said bank, in view of the present admitted fair market value of its assets which exceed such liabilities by several million dollars (R. 11). Plaintiff also alleges that the concerted policy of defendants, as set forth in paragraphs 13 and 14 of her complaint (R. 7 & R. 8) operates as a fraud upon her. (R. 9.) Plaintiff also alleges clear error of law on the part of the Comptroller. (R. 11.)

By this record, and the Lower Court's order of December 21, 1939, *made without findings of fact or*

conclusions of law (italics supplied), and dismissing the amended and supplemental complaint, there is no way to determine for example, whether the Court's dismissal was—

(a) Because it believed there was sufficient assets to pay all claims, but the Lower Court doubted its power to act, or whether

(b) The Lower Court did not believe there were sufficient assets in the hands of Receiver Schram, with which to pay all claims or whether

(c) The Lower Court dismissed the complaint because Receiver Schram and the Bank were not properly before the Lower Court, being residents of Michigan.

Appellant respectfully submits that on this question alone, it is apparent that the Court's dismissal, without findings of fact or conclusions of law—renders it impossible for this Honorable Court of Appeals to review properly the judgment of dismissal within its rule of *Boos v. Hardee, supra*.

Point III.

There are many decisions where various acts of the Comptroller and Receiver of a National Bank have been fully examined by the Courts—and decisions on the merits had.

By turning to these decisions on the merits, we find in—

(a) *U. S. Savings Bank vs. Morgenthau*, 66 App. D. C. 234, 85 Fed. (2d) 811—this Honorable Court held that stockholders were not entitled to

a restoration of the bank's assets to its stockholders by the receiver, unless it appeared that the assets were sufficient to pay "both the principal of the debts and the interest thereon" in full, and that there were no facts averred which showed arbitrary or bad faith acts of the Comptroller.

(b) In the *Cooper v. O'Connor* case in 69 App. D. C. 100, 99 Fed. (2d) 135 and 143 this Court held that damages for malicious prosecution by the Comptroller and his attorneys were not recoverable, under a charge of conspiracy, *when the acts complained of were within the official duties of the defendants.* (Italics supplied.)

(c) In *Dunn v. O'Connor*, 67 App. D. C. 76, 89 Fed. (2d) 820, this Court of Appeals held that although it was not proper to resist an assessment liability by a National Bank Receiver, by an effort to show that certain claims or assets would make such assessment unnecessary—nevertheless, the complaint should not be dismissed when the Comptroller's decision as to unlawfulness of claims against the Bank was properly before the Courts. See page 829 of 89 Fed. (2d) on this point.

(d) While in *Cooper v. Woodin*, 63 App. D. C. 311, (72 Fed. (2d) 179) this Court of Appeals held *on the merits* that the refusal of the Comptroller of the Currency to approve a reorganization plan was justified.

In this case the Comptroller of the Currency filed answer on the merits and the case was disposed of as it should have been—and not by an attempt at con-

cealment of material facts by a motion to dismiss, as was done in the case at bar.

The Court said:

“Upon a review of the record we are convinced that the Comptroller of the Currency was acting within his statutory authority in holding that the plan of reorganization proposed by appellant was not fair and equitable as to the depositors and other creditors of the bank, and is not in the public interest, and that the Comptroller was right in refusing to adopt appellant’s proposed plan, and consequently that his action in this behalf was not arbitrary or capricious.

In view of our opinion upon the unmistakable facts of the case and the plan provisions of the statute we find it unnecessary to refer to the many court decisions and other authorities cited by the respective parties.

The decision of the lower court is affirmed with costs.”

The Courts have repeatedly held that no administrative officer may act arbitrarily or capriciously or contrary to the law—without being called to account by the Courts in a proper action.

For example, relief upon the merits has been granted where:

(a) National Bank Receivers have illegally sold assets in their control.

Jackson vs. Comptroller of the Currency, 12 Fed. (2) 676 (5 C. C. A.) Cert. denied 273 U. S. 697.

(b) National Bank Receivers have fraudulently sold assets in their control.

Baker vs. Schofield, Receiver, etc., 243 U. S. 114.

(c) National Bank Receivers have illegally paid out assets in their control.

Rhodes v. O'Connor, 65 App. D. C. 21, 79 Fed. (2d) 145, Affd. 297 U. S. 383.

(d) And the Courts have reviewed upon the merits a refusal by the Comptroller of the Currency to approve a reorganization plan.

Cooper v. Woodin, 63 App. D. C. 311, 72 Fed. (2d) 179.

(e) And decisions by the Comptroller and Receivers respecting prior contracts of insolvent National Banks will be reviewed on the merits.

Dunn v. O'Connor, 67 App. D. C. 76, 89 Fed. (2d) 820, 829.

Point IV.

The Federal Courts of Equity are open to small depositors and stockholders—as well as to large ones—to question the legality—as well as the advisability of a corporate contract or act.

See—

Ashwander v. T. V. A., 297 U. S. 288.

And see where:

(a) A Class suit involving millions of dollars was brought by *one Depositor* in a National Bank.

O'Connor v. Rhodes, 65 App. D. C. 21, 79 Fed. (2d) 146, Affd. 297 U. S. 383.

“Per Curiam.

Respondent, Thomas E. Rhodes, suing in his own right and on behalf of other creditors of the Commercial National Bank of Washington, sought the restoration of amounts alleged to have been

illegally paid to petitioners by the Bank's receiver."

(b) And where a suit was brought by a majority stockholder, who was also a depositor, to compel the Comptroller of the Currency to approve a plan of reorganization, etc.

Cooper v. Woodin, 63 App. D. C. 311, 72 Fed. (2d) 179.

(c) While the rule of the Sixth Circuit Court of Appeals is stated in *General Co. v. Ry. Co.*, 250 Fed. 160, to be:

"* * * (c) The amount of such stock, namely 5 shares, was not so inconsiderable and trifling in value that the plaintiff should, on that ground, be denied such equitable relief as it might otherwise be entitled, as a matter of right, to receive; especially as its petition was also filed in behalf of other stockholders similarly situated, some of whom, if the suit had been proceeded with, might, for aught then appearing, have joined and shared its benefits."

To summarize on this Point:

- (1) O'Connor v. Rhodes, 65 App. D. C. 21, 79 Fed. (2d) 146, Affd. 297 U. S. 383 (Suit by One Depositor).
- (2) Jackson v. McIntosh, 12 Fed. (2d) 676, (5 C. C. A.) Cert. denied 273 U. S. 697 (Suit by one stockholder and two depositors).
- (3) Cooper v. Woodin, 63 App. D. C. 311, 72 Fed. (2d) 179 (Suit by one stockholder who was a depositor).
- (4) Wittnebel v. Loughman, 80 Fed. (2d) 222 (2 C. C. A.) Cert. denied (Suit by one stockholder 935 shares out of 25,000).
- (5) Ashwander v. T. V. A., 297 U. S. 288 (Suit by one stockholder—later joined by others).

Point V.

It may be contended that a presumption arises that the Comptroller is properly performing his duties and statutory obligation to speedily wind up the affairs of First National Bank-Detroit, and terminate the said receivership now.

But such presumption may be shown to be unfounded—and such questions are for trial on the merits.

U. S. Chemical Foundation, 272 U. S. 1, 14.

Proctor & Gamble Company v. Coe, 68 App. D. C. 246, 96 Fed. (2d) 518, 521.

And see—

Cooper v. O'Connor, 69 App. D. C. 100, 99 Fed. (2d) 135,

where it was said that presumption could be overcome by “allegations or proof to the contrary.”

Point VI.

Upon motion to dismiss—the facts set forth in the complaint are admitted.

Polk Company v. Glover, 305 U. S. 5-19, 83 L. Ed. 6.

School v. McAnnulty, 187 U. S. 94.

Geiger v. Trust Co., 30 Fed. (2d) 7 (6 C. C. A.)

Point VII.

This case is not an attempt to defeat a stock assessment liability imposed upon National Bank stockhold-

ers generally, in so far as the discretion of the Comptroller of the Currency in levying an assessment is primarily concerned.

Thus the distinction between an attempt by a National Bank stockholder to defeat such an assessment suit—

and a case where an accounting and winding up of the bank's receivership is asked—is well set forth in *Stephens v. Hamilton*, 81 Fed. (2d) 324 (7 C. C. A.)

But this case at bar does seriously question the right of the Comptroller of the Currency:

(a) to absent himself from the Michigan District Court—by objecting to its jurisdiction over him—and

(b) to then direct his Receiver in this same Michigan Court to collect an assessment from this Mills Estate—and

(c) to further direct and permit his Receiver to contend to the Michigan Court, that the defense raised by the Mills Estate (the Statute of Limitations) *cannot be decided on its merits—because the Comptroller of the Currency is not a party—* since such a defense amounts to a “collateral” attack upon *the decision of the absent Comptroller.*

Appellant Cleveland submits such tactics by the Government should not be countenanced by a Court of equity.

The point is that plaintiff-appellant has attempted to show in the Michigan District Court—and to this Honorable Court that—

(a) As a matter of fact, the Receiver has more than sufficient assets with which to pay one hundred cents on the dollar to all depositors,

(b) without collecting any claimed assessment liability from the Mills Estate

(c) that, therefore, the attempt to collect from the Mills Estate is essentially a suit to collect and pay interest on the deposits—from the closing of the Bank—and that

(d) such a suit is, therefore, one for damages for injuries (that is detention) to property—

See—

Ticonic National Bank v. Sprague, 303 U. S. 406, 410

(e) And, therefore, barred by the three year Statute of Limitations of Michigan—

It is this fact.—namely that the Receiver has enough assets on hand to pay one hundred cents on the dollar to all depositors (and, therefore, the suit against the Mills Estate is merely for interest or damages for detention of deposits) *that the defendant Receiver is seeking to prevent plaintiff Cleveland from proving in the Michigan District Courts.*

For defendant Receiver says—unless the Comptroller of the Currency is a party in the Michigan case—you (plaintiff) cannot show such fact—for it is a “Collateral attack” upon the *absent Comptroller’s decision* made in 1933—that an assessment is necessary.

And to further this scheme of evasion by the Receiver—the Comptroller refuses to come into the Michigan jurisdiction, although made a party defendant.

NOW defendant Comptroller of the Currency, here on appeal before this Honorable Court of Appeals, wants to interpose the defense by motion to dismiss—that plaintiff cannot have any relief, because it cannot now be determined whether the Bank's assets will pay 100 cents on the dollar. (See Record 67, 68.)

But on that question—the averments of the complaint (See paragraphs 19 to 21) (R. 10, 11) are that the assets are sufficient to pay 100 cents in full—and this must, under familiar rules be held to be admitted by the Comptroller's motions to dismiss—

And so again it appears that the District Court's decree of dismissal—entered without findings of fact or opinion of any kind—has seriously—if not totally prevented this Honorable Court from deciding this appeal properly.

For it cannot be determined whether the District Court held (as to paragraph 6 of the motion to dismiss) that

(1) Plaintiff was not entitled to prove that the Receiver already had on hand assets sufficient to pay 100 cents on the dollar—or

(2) That plaintiff—assuming the fact to be so—was not within the statute of limitations of Michigan on the merits of the question—or

(3) Whether the fact that the Receiver of First National Bank-Detroit and the Bank were not in Court prevented a decision on the merits.

I. It might be very logically argued that for the Comptroller of the Currency to avoid appearance in

Michigan in a suit in which he is made a party defendant—and then order his Receiver to proceed to collect an assessment of \$65,000 against the Mills estate—and

at the same time permit and direct his Receiver *to avoid a decision of a defense raised—on the ground that the Comptroller was not in Court—*

amounts to an abuse of the process of the Michigan Courts,

which this Court—having jurisdiction of the Comptroller—should enjoin.

II. And since the Comptroller of the Currency avoids the jurisdiction of the Michigan District Court, this action by him should estop his Receiver from defending on the ground that the Comptroller is not a party—and, therefore, from further claiming that the facts supporting the defense of the Statute of Limitations raised by the Mills Estate—cannot be proved as a matter of defense.

For inconsistent positions cannot be adopted at different judicial proceedings between the same parties.

Davis v. Wakelee, 156 U. S. 680.

Cavender v. *id.*, 114 U. S. 464.

Norfolk etc. RR. v. Chatman, 244 U. S. 276.

Great Falls Bank v. McClure, 176 Fed. 208 (9 CCA).

Euclid Co. v. Bank, 48 Fed. (2d) 757 (6 CCA).

Hassberger v. Supply Co., 213 Mich. 489.

19 Am. Jur. Page 704.

Applying these rules—we find that:

(1) The Comptroller of the Currency seeks to avoid a decision on the merits in the Michigan Courts by having his Receiver admit (by his motion to dismiss) that there are sufficient assets to pay all depositors in full 100 cents on the dollar—but that

(2) This cannot be shown as a defense because the Comptroller is not brought into the Michigan Courts by valid service of process—and therefore the Court is without jurisdiction of the subject matter, etc.—and

(3) Then when a suit is brought in the District of Columbia against the Comptroller, to apply this admitted fact (namely that there are sufficient assets in the hands of the Receiver to pay all depositors one hundred cents on the dollar) so admitted by the Receiver's motion to dismiss filed in the Michigan Court we find that

(4) Here in this District of Columbia Court, the Comptroller of the Currency is now attempting to deny (by his motion to dismiss), (bottom page 67 of Record) the existence of this very fact of 100 per cent in assets—so admitted by the Receiver's motion to dismiss in the Michigan court—

Such undignified dodging around by the Comptroller, by use of such inconsistent positions—is, we submit, forbidden by the rules announced and applied in the above authorities—

Point VIII.**Conclusion of Brief.**

Appellant Cleveland respectfully submits to this Honorable Court of Appeals that the District Court's order of dismissal, entered December 21, 1939, should be set aside for:

(a) No findings of fact or opinion were filed by the District Judge—

(b) The plaintiff is entitled as a matter of simple right, to defend her interests in her father's estate by proof of the facts supporting the defense of the Statute of Limitations of Michigan—in an action where the Comptroller of the Currency is a party—

so that his Receiver of First National Bank—Detroit cannot make the technical defense that such facts (that assets in his hands more than equal 100 cents on the dollar) cannot be proved in the absence of the Comptroller—

(c) The evasive tactics of the Comptroller of the Currency as outlined in appellant's Points on Appeal No. IV, R. 71 should be enjoined—and the

Comptroller should be directed to enter the Michigan District Courts and try the plaintiff's defense of the Statute of Limitations on the merits—

Respectfully submitted,

ALBERT W. FOX,
WILLIAM ALFRED LUCKING,
Attorneys for Appellant.

Joseph D. Barse

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1940

—
No. 7614
—

CYNTHIA MILLS CLEVELAND, *Appellant,*

v.

PRESTON DELANO, Comptroller of the Currency,
Appellee.

—
Appeal from the District Court of the United States
for the District of Columbia.

—
BRIEF FOR APPELLEE.
—

GEORGE P. BARSE,
Attorney for Appellee.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1940

No. 7614

CYNTHIA MILLS CLEVELAND, *Appellant*,

v.

PRESTON DELANO, Comptroller of the Currency,
Appellee.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLEE.

A.

SUPPLEMENTAL STATEMENT OF THE CASE.

The bill of complaint named as defendant B. C. Schram, Receiver of First National Bank-Detroit, in addition to naming the Comptroller of the Currency, Preston Delano. The Marshal's return shows, as to B. C. Schram, "Not to be Found" (R. 35). The case

proceeded thenceforth with the Comptroller of the Currency as sole defendant. The motion to dismiss was filed on behalf of the Comptroller (R. 65) alone, and the order dismissing the bill of complaint sustained the motion as the motion of the Comptroller of the Currency (R. 69).

The case was tried solely upon the pleadings. No evidence was offered. A statement of facts would be merely a summary of such of the allegations as constituted facts properly pleaded. The brief of appellant contains some statements and comments (during the course of the statement of the case and of the material prior to the statement of the argument) which are not statements of fact but are merely the conclusions or arguments of appellant. For example, on page 8 of the brief appears:

“V. Statement of Plaintiff’s Amended Complaint (R. 1 to 65) *admitted by motion to dismiss*” (Italics inserted).

The nature of such and similar statements are obvious upon perusal, and do not require comment here. They are mentioned in the course of appellee’s discussion and argument to the extent deemed necessary.

B.

SUMMARY OF ARGUMENT.

I.

Response to Appellant's "Point I" Concerning Failure of Court Below to Make Findings of Fact and to State Conclusions of Law.

(a) The failure of the court below to make findings of fact and to state conclusions of law was not called to the attention of the trial court and the alleged error was not included by appellant in his Points on Appeal, the point being raised for the first time in appellant's brief on appeal. Under the rules of this court, the point should now be disregarded. (For discussion of the foregoing portion of the response, see Appendix p. 24.)

(b) It was not necessary for the court below to make Findings of Fact and state Conclusions of Law, under the circumstances of this case. The motion to dismiss set forth the specific issues raised, and admitted, for purposes of argument, all substantial facts well pleaded. No disputed issue of fact was involved in the determination of the case by the court below. (For discussion of the foregoing portion of the response, see Appendix p. 25.)

II.

Response to "Point VII" of Appellant's Brief.

The contention of appellant that the assets of the bank are sufficient to pay 100 per cent of the principal of the established claims against the bank and that consequently the further collection of the assessment would be, in effect, the collection of interest, and that

the collection of such interest is barred by the Michigan statute of limitations,—is unsound and untenable and should be rejected.

(1) The contention of appellant that the assets of the bank were sufficient to pay 100 per cent of the claims against it, and that an assessment was therefore unnecessary, constituted a collateral attack against the validity and effectiveness of the levied assessment. The law is settled that such contention cannot be sustained for the purpose of defeating the assessment.

(2) The factual matters appearing in the bill of complaint do not support appellant's allegations in the bill that the assets of the receivership bank are sufficient to pay the claims against it in full, nor to pay 100 per cent of the principal of such claims.

(3) The contention of appellant that the suit to collect the assessment is in effect a suit to collect interest by way of damages and as such is barred by the Michigan statute of limitations, is without substance and is unsound. The cases of *Schram v. Wolf* and *Schram v. Davis* referred to by appellant hold squarely against such contention.

C.

ARGUMENT.

I.

Response to Appellant's "Point I" Concerning Failure of Court Below to Make Findings of Fact and to State Conclusions of Law.

(a) The failure of the court below to make findings of fact and state conclusions of law was not called to the attention of the trial court and the alleged error was not included by appellant in the Points on Appeal, the point being raised for the first time in appellant's brief on appeal. Under the rules of this court, the point should now be disregarded. (For discussion of the foregoing portion of the response, see Appendix, p. 24.)

(b) It was not necessary for the court below to make Findings of Fact and state Conclusions of Law, under the circumstances of this case. The motion to dismiss set forth the specific issues raised, and admitted, for purposes of argument, all substantial facts well pleaded. No disputed issue of fact was involved in the determination of the case by the court below. (For discussion of the foregoing portion of the response, see Appendix p. 24.)

Explanatory Note.

Appellant's "Point I" in the instant case is substantially the same as "Point I" in case No. 7628 on the Special Calendar of this Court entitled *William Alfred Lucking, Appellant, v. Preston Delano, Comptroller of the Currency, et al.*, presented by the same attorneys who are counsel for Appellant in the instant case. Sub-

stantially the same issues and principles concerning this point are involved in the two cases. Substantially the same argument upon the point was made by counsel for Appellant in the original briefs in both cases, except that the discussion concerning these issues in No. 7628 was extended in additional briefs filed by counsel on both sides thereof. Said case No. 7628 has been argued and is now under consideration by this Court. Having in mind that by the time the instant case is reached for oral argument, these issues may already have been determined by this Court in its forthcoming decision and opinion in said Case No. 7628, counsel for the Comptroller of the Currency has considered that in the interest of avoiding repetition in the body of this brief of the argument on this point on behalf of the Comptroller contained in his briefs in said No. 7628, it would be preferable and advisable to place the argument on behalf of the Comptroller in the instant case (as herein rearranged and consolidated) in the Appendix hereof, (*infra*, pp. 24 to 31) for such reference thereto as may be found necessary in the event decision in case No. 7628 has not been rendered by the time oral argument is reached in the instant case.

II.

Response to "Point VII" of Appellant's Brief.

The contention of appellant that the assets of the bank are sufficient to pay 100 per cent of the principal of the established claims against the bank and that consequently the further collection of the assessment would be, in effect, the collection of interest, and that the collection of such interest is barred by the Michigan statute of limitations,—is unsound and untenable and should be rejected.

The major contentions of appellant upon the foregoing point are summarized in subparagraphs (a) to (e), both inclusive, on page 24 of appellant's brief. Appellant complains that she was prevented from setting up this defense in the pending litigation in Detroit (R. 7, 8, 13), and hence she seeks to set up such defenses in the instant case and asks a reversal of the decision of the court below by reason of its refusal to recognize these contentions as a valid defense to the assessment action. Appellee submits that the action of the court below was sound and that its decision should stand. In this connection, it may be noted that the motion to dismiss filed by appellee (R. 65-69), specifically presented to the court below, the grounds upon which appellee contended that a cause of action was not stated in the bill of complaint as amended and that the same should accordingly be dismissed. The points thus raised will here be considered.

(1) *The contention of appellant that the assets of the bank were sufficient to pay 100 per cent of the claims against it, and that an assessment was therefore unnecessary, constituted a collateral attack against the valid-*

ity and effectiveness of the levied assessment. The law is settled that such contention cannot be sustained for the purpose of defeating the assessment.

The decisions of the courts are many in number, and uniform, to the effect that the shareholders of a national bank cannot successfully attack an assessment duly levied by the Comptroller of the Currency,—by setting up, by way of defense, that the assets of the bank are sufficient to pay all claims, and that the assessment is unnecessary. Under this aspect, it is immaterial whether such contention is advanced by way of defense to an action brought by the receiver of the bank against the shareholders, or whether such defense be set up in an action brought by the shareholders against the receiver and/or the Comptroller *purporting* to make a direct attack upon the assessment upon the aforesaid grounds. *The character of the attack, as collateral or as direct, is not necessarily determined by whether the Comptroller of the Currency is a party to the suit thus brought by the shareholders, but it is determined by the grounds upon which such attack is founded.* Where such attack is on the ground that the assets are sufficient to pay the claims, and therefore the assessment is unnecessary, such attack, in effect, only questions the correctness of the judgment of the Comptroller in levying the assessment and in determining the necessity for such assessment. *The suit thus filed is still a collateral attack upon the assessment, even though the Comptroller may be the sole defendant.*

The law has vested in the Comptroller of the Currency the quasi-judicial function of determining the necessity for the assessment. Such determination will not be disturbed by the courts in the absence of an appropriate proceeding attacking the levy of the assessment on the ground of fraud and bad faith on the part

of the Comptroller in the performance of his functions incident to the levy of the assessment. The comparatively recent decision of *Adams, Receiver, v. Nagle et al.*, 303 U. S. 532, is directly in point. In that case, suit was filed by the shareholders of two national banks (Penn National Bank & Trust Company and Reading National Bank & Trust Company) against Adams, the receiver for both of said banks, and against the Comptroller of the Currency, to enjoin enforcement of assessments levied against said shareholders. The shareholders contended that each of the two banks had assets, in the form of claims, respectively, against a third bank, (Farmers National Bank & Trust Company) which, if enforced and collected by the receiver of the two banks, would be sufficient to pay the claims against the respective banks in full; and that the "failure, neglect, and refusal to collect the claims of Penn and Reading against Farmers and a consequent failure to comply with the conditions and provisions of the statute authorizing assessments" was "in fraud of the rights" of the creditors and stockholders of the Penn and the Reading banks. It was charged by the shareholders in this connection that the conduct of the Comptroller was arbitrary and was an unlawful assumption of judicial powers not delegated to him by statute. *The stockholders further contended that the assets of a national bank in receivership must be substantially exhausted and liquidated before an assessment could properly be levied.* The Supreme Court overruled these contentions and, in effect, held that the bill of complaint, even though brought by the shareholders, *was a collateral attack and could not be sustained in the absence of appropriate allegations effectively charging bad faith or fraud on the part of the Comptroller.* The following extracts from the opinion of the court are pertinent,

and are set forth at some length as a matter of convenience of reference :

“At the argument the position was taken that the Comptroller was without power to lay an assessment until he had gotten in the avails of all the ordinary assets of the banks and that the claims of Penn and Reading against Farmers under the contract of February 17 were such ordinary assets. The conclusion is that until the receiver of Penn and Reading had recovered upon the contract and distributed the proceeds the Comptroller was without power to order an assessment.” (Page 539.)

* * * * *

“The question remains whether, if the Comptroller’s action arose from mistake of fact or law, the remedy here invoked is appropriate. In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent. of the par value of the stock against the shareholders to pay creditors’ claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller’s decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done.⁷ It would be equally intolerable if stockholders as a class could call upon a court to review the Comptroller’s exercise of his discretion. For a court to entertain a suit for this purpose would be to render nugatory the func-

⁷ Kennedy v. Gibson, 8 Wall. 498, 505; Casey v. Galli, 94 U. S. 673, 681; Bushnell v. Leland, 164 U. S. 684.

tions Congress has confided in the Comptroller. It has often been decided this may not be done.” (Page 540.)

* * * * *

“Relying on this expression a number of the federal courts have said that, while an assessment may not be collaterally attacked, it may be avoided by direct attack for ‘clear error of law, fraud or mistake.’” Respondents admit this statement is too broad. Other courts have said that the only ground of successful attack is fraud on the part of the Comptroller.¹⁰ This case presents no such basis for relief. The bills do not charge bad faith or fraud on the part of the Comptroller. The averment that his ruling with respect to the contract of February 17 and the consequent action of the receiver were ‘in fraud’ of the rights of Penn and Reading and their stockholders falls far short of any charge of actual fraud. Indeed no suggestion of such fraud was advanced by respondents either in brief or in argument.” (Page 542.)

* * * * *

“The respondents further insist that their allegation that the Comptroller’s action was ‘arbitrary’, which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet ‘arbitrary’, used in this connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, ‘com-

⁸ *Liberty National Bank v. McIntosh*, 16 F. (2d) 906; *Wannamaker v. Edisto National Bank*, *supra*; *Meeker v. Baxter*, 83 F. (2d) 183; *Davis Trust Co. v. Hardee*, 85 F. (2d) 571; *Acker v. Hamilton*, 85 F. (2d) 574; *Barbour v. Thomas*, 86 F. (2d) 510; *Church v. Hubbard*, 91 F. (2d) 406.

⁹ See, *e. g.*, *Deweese v. Smith*, 106 Fed. 438, 445; *Emery & Co. v. Wilkinson*, 72 F. (2d) 10, 12; *Trustees v. Pieher*, 90 F. (2d) 741, 743; *United States Nat. Bank v. Pole*, 2 F. Supp. 153, 157; *Angeny v. Keuper*, 16 F. Supp. 542, 543.

¹⁰ *O’Conner v. Watson*, 81 F. (2d) 833, 836; *Meeker v. Baxter*, 83 F. (2d) 183, 186; *Davis Trust Co. v. Hardee*, 85 F. (2d) 571, 573; *Dunn v. O’Connor*, 89 F. (2d) 820, 827.

mitted grave error of law' in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible." (Page 543.)

* * * * *

"These and other matters were to be considered by him in arriving at an informed judgment as to the availability and value of the assets of Penn and Reading to answer the claims of their creditors. As an exercise of the discretionary power vested in him, the Comptroller's action must be treated as final and conclusive as to the necessity for an assessment.

"5. If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. Moreover, if, as they assert, the Comptroller's judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the creditors, the protection of whose interests is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors." (Page 544.)

* * * * *

Also see:

Harper v. Moran, 64 App. D. C. 210; 76 F. (2d) 980;
Davis Trust Co., et al. v. Hardee, et al., 66 App. D. C. 168; 85 F. (2d) 571;
Kennedy v. Gibson, and others, (1869) 8 Wall. 498, 505;
Casey v. Galli, (1876) 94 U. S. 673, 677;
Stephens v. Hamilton, (C. C. A. 7th, 1936) 81 F. (2d) 324;
Miller v. Stock, et al., (C. C. A. 3rd, 1933) 65 F. (2d) 773, 774;
Crawford v. Gamble, (C. C. A. 6th, 1932) 57 F. (2d) 15, 16;
Deweese v. Smith, (C. C. A. 8th, 1901) 106 Fed. 438, *aff'd. per curiam* (1902) 187 U. S. 637;
Church v. Hubbard, et al., (C. C. A. 6th, 1937) 91 F. (2d) 406.

(2) *The factual matters appearing in the bill of complaint do not support appellant's allegations in the bill that the assets of the receivership bank are sufficient to pay the claims against it in full, nor to pay 100 per cent of the principal of such claims.*

Appellant alleges in the original bill of complaint (R. 9, 10, 11) that the assets of the receivership are more than sufficient to pay all claims against the bank in full. Such allegations, however, constitute only the conclusions of the pleader. They are not supported by the factual matters appearing in the bill of complaint itself and to which Appellant refers. In this connection, and in support of such contention, Appellant refers (Par. 21, R. 11) to "Exhibit E" attached to the original bill.

However, an examination of this exhibit (R. 33) does not support these contentions. Said exhibit constitutes the receiver's quarterly statement showing the condition of the receivership as of the close of business on December 31, 1938. It will be noted therefrom that the

value of the remaining uncollected assets (including uncollected stock assessment of \$2,740,975.22) was estimated by the receiver to be \$91,750,292.11. The footnote appearing upon the bottom of said report (in the lower left-hand corner) points out, however, that the foregoing figures merely *"represent the receiver's present estimate of the ultimate liquidation value of these items"* and that such estimates or values *"should not be accepted by the depositor as final either as a basis of prospective dividends or otherwise"*.

In the "Amendments to Complaint", Appellant reiterates, in effect, (R. 46) the sufficiency of the assets to discharge in full all liabilities of the receivership, and refers to "Exhibit C" constituting the receiver's statement of condition of the bank as of the close of business March 31, 1939. Said "Exhibit C" appears on pages 62-65 of the Record, and it will be observed, in the footnote at the bottom of page 63 of the Record that the receiver makes the same comment and explanation to the effect that the values therein stated represent only the receiver's present estimate of the ultimate liquidation of the value of the items, etc.

It is obvious that the ultimate liquidation value of the remaining assets could not be determined, and therefore the amount of dividends to be paid therefrom could not be known, until the actual liquidation of the assets. Such liquidation might or might not ultimately yield sufficient to pay 100 percent of the principal of the claims. The depositors and other creditors of the bank have the right to be paid in cash, and sections 5234 and 5236, Revised Statutes (secs. 192 and 194, Title 12, U. S. C.) expressly direct the liquidation of assets for the purpose of paying cash dividends to the depositors and other creditors.

It is clear, in view of the foregoing, that the bill of complaint does not establish, and consequently the motion to dismiss does not admit, that the assets of the bank were sufficient to pay 100 percent of the principal amount of said claims, and it must be held that appellant's allegations in this respect are mere conclusions of fact not supported by the other allegations in the bill.

(3) The contention of appellant that the suit to collect the assessment is in effect a suit to collect interest by way of damages and as such is barred by the Michigan statute of limitations, is without substance and is unsound. The cases of Schram v. Wolf and Schram v. Davis referred to by appellant hold squarely against such contention.

The theory of appellant with reference to the application of the Michigan statute of limitations is, as previously indicated (*supra*, p. 7), summarized on page 24 of her brief and is as follows:

“(a) As a matter of fact, the Receiver has more than sufficient assets with which to pay one hundred cents on the dollar to all depositors,

“(b) without collecting any claimed assessment liability from the Mills Estate

“(c) that, therefore, the attempt to collect from the Mills Estate is essentially a suit to collect and pay interest on the deposits—from the closing of the Bank—and that

“(d) such a suit is, therefore, one for damages for injuries (that is detention) to property—

“See—

Ticonic National Bank v. Sprague, 303 U. S. 406, 410

“(e) And, therefore, barred by the three year Statute of Limitations of Michigan—”.

The major premise of the foregoing argument is the assumption that the assets are sufficient to pay “100 cents on the dollar to all depositors”. We have previously indicated (*supra*, p. 7) that this assumption, as a matter of defense, constitutes a collateral attack and cannot be raised to defeat the assessment. We have also indicated (*supra*, p. 13) that on the face of the record, as shown by appellant’s original and amended bill of complaint, the contention as to the sufficiency of the assets to pay 100 percent of principal is not supported by the factual matters therein set forth.

In view of the fact that appellant’s assumed major premise of the sufficiency of the assets to pay 100 percent of the principal amount of the claims against the bank, cannot be sustained, it necessarily follows that the entire argument based upon said fallacious major premise (to the effect that the attempt to collect the assessment is an attempt to collect interest and that the collection of such interest is barred by the Michigan statute of limitations) must necessarily fail.

Furthermore, even if it were assumed, for the purpose of discussion only, that the unliquidated assets had ultimate liquidation value sufficient in amount to pay 100 percent of the principal of the claims against the Bank, such assumed fact would not be sufficient, as a matter of law, to defeat the collection of the assessment. It has previously been pointed out (*supra*, p. 8) that the national banking laws contemplate the levy and collection of the assessment for the purpose of permitting the payment of the claims against the Bank from the proceeds of such assessment (plus the

proceeds on hand of any liquidation from the assets) without awaiting the complete liquidation or exhaustion of the assets. (*Adams, Receiver v. Nagle, et al.*, discussed, *supra*, p. 9).

It is shown by appellant's bill of complaint as amended (R. 9, 46), that at the time the instant suit was filed only 80 percent in dividends had been paid to the creditors of the Bank. Consequently appellant's contention that further collection of the assessment must be solely for the purpose of the payment of interest and that such collection should be enjoined, is clearly prematurely raised. Such an issue could not properly be raised before 100 percent of the principal amount of the claims had been paid, nor before the repayment, with interest, of any loan obtained by the Receiver for the purpose of paying the remaining unpaid amount of the principal upon such claims. This point was specifically raised in numbered paragraph 6 of the motion of the Comptroller of the Currency to dismiss the bill of complaint as amended (R. 67-68) and the decision of the court below granting the motion to dismiss must be presumed to have had this point in mind.

Wolf and Davis Cases

Pages 3 and 4 of appellant's brief refer to the cases of *Schram, Receiver, First National Bank-Detroit v. Wolf*, and *Schram, Receiver, First National Bank-Detroit v. Davis*. The statements are made by appellant that in these cases *judgments were entered against the defendants* "on the same stock assessment liability" (meaning, of course, liability under the same assessment as owners of stock in First National Bank-Detroit), and that "when they sought to defend on the same ground of Statute of Limitations * * * the

Circuit Court of Appeals of the Sixth Circuit put its decision upon the ground that the Comptroller of the Currency was not a party before said Michigan District Court."

Appellant then quotes the *per curiam* opinion of the Court of Appeals (identically rendered in each case):

"Before Hicks, Allen and Arant.

"This case came on for hearing upon the record, briefs and arguments of counsel, and it appearing that it arises out of the same state of facts as *Barbour v. Thomas*, 86 F. (2d) 510, a class suit decided by this Court; and it appearing that a motion that the Comptroller of the Currency of the United States be made a party to this suit was denied and no appeal taken therefrom;

"It is ordered and adjudged that the order and judgment of the District Court be affirmed."

It is obvious from the foregoing quotation that the defense of statute of limitations was not denied on the ground that the Comptroller of the Currency was not a party to the litigation; the appellate court simply pointed out in that connection that inasmuch as no appeal had been taken by the defendant from a denial of the motion that the Comptroller of the Currency be made a party,—the decision of the trial court denying the motion must be affirmed.

The decisions of the appellate court in these cases are reported in 111 F. (2d) 144 and 146. The appellants therein, Davis, and Wolf, applied to the Supreme Court of the United States for a writ of *certiorari* and the writ was denied, 85 L. Ed. Ad. Op. 60.

An examination of the transcript of record in the Supreme Court in said cases (if this Court deems it appropriate to do so) will disclose, as appellant's brief

in the instant case indicates (p. 3) that substantially the same defense of statute of limitations was set up in those cases upon substantially the same grounds (sufficiency of assets to pay claims in full) advanced in the instant case. Said defense in those cases was overruled by the trial court on the ground that it constituted a collateral attack, and not on the ground the comptroller was a necessary party.

(Incidentally it may be noted that Mr. Lucking, counsel for appellant in the instant case, was counsel for the defendants in the Wolf and Davis cases).

**Schram, Receiver, First National Bank-Detroit v.
William Alfred Lucking, et al., 31 F. Supp. 749**

In the foregoing case suit was brought by the Receiver of First National Bank-Detroit against William Alfred Lucking and Dean Lucking, administrators of the Estate of Alfred Lucking, to enforce assessment liability against the estate as the alleged owner of shares of stock in the bank. Defendants raised, in that case, substantially the same defense raised on behalf of appellant in the instant case, concerning the alleged sufficiency of the assets to pay claims against the bank in full, and the application of the statute of limitations, *et cetera*. Federal District Judge Picard, in denying these contentions, said at page 753:

“As to defendants’ other contention in opposition to this court permitting the Receiver a judgment on the assessment, we find that there is no merit to the same and must refuse to permit testimony to show that today there are sufficient assets on hand to pay all creditors and depositors 100 cents on a dollar. We believe this to be a collateral attack upon comptroller’s findings as to insolvency

of the bank. We hold the necessity for assessments has already been decided in the following cases: Barbour v. Thomas, 6 Cir., 86 F. 2d 510; Crawford v. Gamble, 6 Cir., 57 F. 2d 15; Adams v. Nagle, 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999.

“Defendants also claim that the statute of limitations furnished another defense to the assessment as plaintiff should have brought this action against defendants within three years. The court finds that even if the evidence had been introduced this would not amount to an action to recover damages for injury to person or property which would bring the action within the three year rule. This is governed we believe by section 13976, C. L. 1929 which grants a period of six years in which such cause of action should be brought. *If in the future defendants seek to prevent the receiver from paying interest on deposits to depositors, appropriate steps may then be taken by defendants or others who may question that right. It is something that may be settled in the future when the time comes, not by this court now.*” (Italics inserted)

III

Response to Various Other Contentions of Appellant

(a) Appellant attempts to make much of alleged evasion by the Comptroller of the jurisdiction of the Detroit courts and of alleged “undignified dodging around” (appellant’s brief, p. 27). There is no substance to these contentions. Suits are filed by and against receivers of insolvent national banks, all over the United States, and it is obvious that it would be impracticable for the Comptroller to participate in such litigation. Furthermore, Section 5234 of Revised Statutes (U. S. C. title 12, sec. 192) contemplates that suits concerning the liquidation of the assets of

such banks shall be brought by and against the receiver. If, in a given case, a party litigant feels that the Comptroller of the Currency is a necessary party, and his contention to that effect is denied or overruled by the court in which the issue is raised, such litigant has his remedy by way of appeal as a means of determining the question. Appellant has that remedy in the Detroit litigation.

It is obvious that such contentions as to evasion of jurisdiction have no application to the instant case, inasmuch as appellant did obtain service upon the Comptroller of the Currency in this jurisdiction and has raised, in the instant case, the defenses which appellant claims she sought to raise in the Detroit litigation.

(b) The allegations in the bill of complaint as amended concerning the alleged negligence of the Union Guardian Trust Company (R. 2-9) in the conduct of the affairs of the trust estate of which appellant was beneficiary, are clearly not proper matters to be determined in litigation in this jurisdiction. Appellant's remedy, if any, is by litigation in the proper courts in Michigan having jurisdiction over the Trust Company. (See numbered paragraph 9 of appellee's motion to dismiss, R. 68, 69.)

It may be noted that appellant does not discuss this question in her brief, and consequently it may be considered waived.

(c) Appellant made allegations in her original bill (R. 42-44) concerning certain illegal payments as to secured and preferred claims. However, this item is not discussed in appellant's brief, and apparently the contentions in this respect are abandoned (presumably as the result of reconsideration after information furnished by the Comptroller's office to counsel for

appellant concerning the same). The item is referred to by appellee in numbered paragraph 7 of the motion to dismiss (R. 68).

(d) The "Amendments to Complaint" (R. 35-65) contain various allegations concerning alleged violation of duty by the Comptroller of the Currency and his predecessors in not terminating the receivership of First National Bank-Detroit by making a sale in bulk of the remaining assets of the receivership under a plan similar to that followed incident to the liquidation and termination of Guardian National Bank of Commerce of Detroit. Other allegations relate to alleged liability of the Comptroller to render an accounting to appellant. These matters are not discussed in the brief of appellant and it must be assumed that they are abandoned. Said matters have been, however, fully presented in Case No. 7628 hereinbefore mentioned (*supra*, p. 5) which has been argued and is now in process of consideration by this Court.

(e) At numerous places throughout appellant's brief the statement is made, in effect, that various facts referred to in the bill of complaint, are admitted by the Comptroller as the necessary result of filing the motion to dismiss. The general rule is, of course, settled, that a demurrer or motion to dismiss admits facts which are well pleaded. Nevertheless, it is likewise settled law that said general rule is subject to the well recognized qualification that it applies *only* to facts *well pleaded* and hence such general rule does not embrace within its scope mere conclusions of law, or mere conclusions of fact not accompanied by appropriate allegations of supporting and substantiating facts; and furthermore, in this connection, it is, of course, recognized that where the alleged supporting or substantiating facts are contrary to the allegations constitut-

ing conclusions of fact, the courts will determine, as a matter of law, the effect thereof.

(f) Appellant's brief, under "Point V", (page 22) refers to the presumption "that the Comptroller is properly performing his duties and statutory obligation to speedily wind up the affairs" of the bank and to terminate the receivership, and suggests that such presumption may be overcome by allegations or proof to the contrary. It is settled law that in the absence of allegations supported by appropriate averments of fact, imputing personal fraud or bad faith on the part of the Comptroller, the acts performed by him in the course of exercise of the administrative discretion vested in him by law will not be disturbed by the courts. *Adams v. Nagle* (*supra*, p. 9); *Cooper v. O'Connor, et al.*, 70 App. D. C. 238, 105 F. (2d) 761; *Cooper v. O'Connor, et al.*, 71 App. D. C. 6, 107 F. (2d) 207; *U. S. Sav. Bank, et al., v. Morgenthau, Secretary of the Treasury, et al.*, 66 App. D. C. 234, 85 F. (2d) 811.

No such allegations of personal bad faith or fraud are contained in the bill of complaint as amended in the instant case.

The other matters or points contained in appellant's brief do not require specific response.

D

Conclusion

The Comptroller of the Currency respectfully submits that in view of the foregoing discussion, the judgment of the court below dismissing the bill of complaint as amended should be affirmed, with costs.

Respectfully,

GEORGE P. BARSE,
Attorney for Comptroller of the Currency.

APPENDIX

A

**Response to Appellant's "Point I" Concerning Failure
of Court Below to Make Findings of Fact and to
State Conclusions of Law.**

(a) The failure of the court below to make findings of fact and to state conclusions of law was not called to the attention of the trial court and the alleged error was not included by appellant in his Points on Appeal, the point being raised for the first time in appellant's brief on appeal. Under the rules of this court, the point should now be disregarded.

Rule 75(d) of the "Rules of Civil Procedure" required appellant to serve upon opposing counsel a concise statement of the points upon which he intended to rely on appeal. Examination of "Appellant's Points on Appeal" (R. 71) as served upon counsel for appellee, discloses that no error was assigned therein relating to the failure of the court below to make findings of fact and to state conclusions of law.

Numbered paragraph 5 of Rule 8 of this court (as amended August 2, 1939), which is substantially the same as numbered paragraph 5 of the previous draft of the rule, provides:

"Points not presented (errors not assigned in criminal cases), according to the rule of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not presented or assigned."

The necessity of stating specifically the assignments of error expected to be relied upon on appeal, and the inclusion of such errors in the transcript of record,

have, of course, been passed upon in numerous cases, one of the latest of which is *Shellman v. Shellman, et al.*, 68 App. D. C. 197, 198; 95 F. (2d) 108.

Furthermore, it would seem that it was clearly incumbent upon appellant to call the matter to the attention of the trial court, particularly in view of Rule 46 of the Rules of Civil Procedure requiring a party to make "known to the court the action which he desires the court to take * * *." See *Massachusetts Bonding and Insurance Co. v. Preferred Automobile Ins. Co.*, (C. C. A. 6th, 1940) 110 F. (2d) 764, 765 (decided by Circuit Judge Simons April 4, 1940). Also see *Drybrough v. Ware*, (C. C. A. 6th, 1940) 111 F. (2d) 548, 550.

The failure of appellant to meet the foregoing requirements is, in and of itself, sufficient to justify this court in disregarding appellant's "Point I".

(b) It was not necessary for the court below to make Findings of Fact and state Conclusions of Law, under the circumstances of this case. The motion to dismiss set forth the specific issues raised, and admitted, for purposes of argument, all substantial facts well pleaded. No disputed issue of fact was involved in the determination of the case by the court below.

It will be observed, upon examination of the record, that the motion to dismiss (R. 65), filed on behalf of appellee, stated that the bill of complaint, as amended, failed "to state a cause of action or claim against defendant upon which relief can be granted, because:"; and said motion thereupon enumerated, in numbered paragraphs, the purely legal questions raised by the motion to dismiss and the amendment thereto. This motion was filed under the provisions of Rule 12, subdivision (b) (6). This portion of the rule and also subdivision (c) thereof clearly contemplate that a trial

court is permitted to enter judgment upon the pleadings.

Rule 52(a) requiring Findings of Fact and Conclusions of Law by the trial court, "in all actions tried upon the facts without a jury" would seem clearly to have no application under the circumstances indicated by the record in the instant case. The case was not tried below upon the facts, but entirely upon questions of law. The instant case did not come within the situation referred to by Mr. Justice Stephens in his opinion in *Associates Discount Corp. v. Crow*, —App. D. C. —, 110 F. (2d) 126, in that no answer was filed in the instant case raising questions of fact or asking that questions of fact be determined, nor were any substantial questions of fact in issue.

The instant case appears to fall within the doctrine referred to in *Cottman Co. et al., v. Dailey*, 20 F. Supp. 142, 145, where the court stated:

"As the motion to dismiss admits the facts stated in the bill, they must be taken as the finding of facts required by general Equity Rule 70½, 28 U. S. C. A. following section 723, and it seems unnecessary to fully repeat them here."

The decision of the trial court, dismissing the bill in equity in said case, was affirmed on appeal (94 F. (2d) 85), but without comment therein being made concerning the application of Equity Rule 70½. To the same effect see *United States Trust Co. of New York, et al., v. Sears*, 29 F. Supp. 643, 645, where Mr. Justice Clark, Circuit Judge, but acting as District Judge, stated:

"Since, therefore, all statements of fact made on behalf of either the plaintiffs or the defendant stand admitted in the documents on file, no formal findings of fact by the court are required. Rule 52 (a), F. R. C. P."

Where evidence is not adduced or stipulated, and issues of fact are not raised, (*i.e.*, where the cases are not tried upon issues of fact), it is common practice for the appellate courts to sustain the judgments of trial courts in cases wherein motions to dismiss were granted, but findings of fact and conclusions of law were not stated.

In the following cases, involving disposition of the suits upon motions to dismiss, it is understood that findings of fact and conclusions of law were not stated by the trial courts. *Adams, Receiver v. Nagle*, 303 U. S. 532. (It will be noted that injunctions were sought in said case and that the bill of complaint set out the facts in great detail.) *Green, et al. v. Brophy, et al.*, (App. D. C. Jan. 15, 1940) 110 F. (2d) 539; *Sevilla v. Elizalde*, (App. D. C. April 15, 1940) 112 F. (2d) 29; *Z. & F. Assets Realization Corporation, et al., v. Hull, Secretary of State*, (App. D. C. June 3, 1940) 114 F. (2d) 464; *Fletcher v. Jones, et al.*, 70 App. D. C. 179, 105 F. (2d) 58; *Ray v. Carr*, (App. D. C. Sept. 5, 1939) 107 F. (2d) 238; *Frank Morgan, Administrator, v. Frank T. Hines, Administrator, Veterans' Affairs*, (App. D. C. July 15, 1940) 7369; *International Trading Corporation v. Edison, Acting Sec. of U. S. Navy*, (App. D. C. 1939) 109 F. (2d) 825; *United States Sav. Bank, et al., v. Morgenthau, Secretary of the Treasury*, 66 App. D. C. 234; 85 F. (2d) 811; *Cooper v. O'Connor, et al.*, 69 App. D. C. 100; 99 F. (2d) 135; *Cooper v. O'Connor*, 69 App. D. C. 108; 99 F. (2d) 143; *Cooper v. O'Connor, et al.*, 70 App. D. C. 238; 105 F. (2d) 61; *Cooper v. O'Connor, et al.*, 71 App. D. C. 6, 107 F. (2d) 207.

Subparagraph (b) of numbered paragraph 25 of appellant's original bill (R. 13) contains a prayer for

temporary and permanent injunctions. Consequently appellant may suggest, in oral argument, that even if it be assumed, for discussion, that findings of fact and conclusions of law are not required under the first portion of Rule 52(a), the same are required under that portion of the rule reading:

“and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action.”

However, an examination of the record discloses that appellant made no application or motion for a preliminary or interlocutory injunction as required by Rule 65 of the Federal Rules of Civil Procedure. See *Thermex Co. v. Lawson*, 25 F. Supp. 414; *Penmac Corporation, et al. v. Falcon Pencil Corporation*, 28 F. Supp. 639. The court below entered no order granting or refusing an interlocutory injunction. The case was disposed of by the order of the court sustaining the motion of appellee to dismiss the bill of complaint as amended. (R. 69)

Furthermore it is also submitted that, settled rules of statutory construction having application by analogy here, require that both portions of the first sentence of Rule 52(a) be considered with reference to each other, and if this be done, it appears that the language “in all actions tried upon the facts without a jury”, contained in the first portion of the first sentence was intended to be generic in character and to cover all types of cases tried upon the facts without a jury regardless of whether such cases did or did not involve the granting or refusing of interlocutory injunctions.

None of the cases cited in appellant’s brief on this

question appear to be contrary to the foregoing position, inasmuch as they deal with situations involving trials upon the facts where evidence was introduced, or where questions of fact were otherwise in dispute. Obviously, findings are necessary in those classes of cases, but such cases do not constitute authority for the proposition that findings must be made where a case is decided upon the pleadings by way of motion to dismiss and an order of court granting that motion. Only two of such cases cited by appellant need be specifically mentioned.

On page 13 of appellant's brief is cited *Edwards v. Holland Banking Company*, (C. C. A. 8th, 1935) 75 F. (2d) 713, where the appellate court remanded the case to the trial court for findings of fact. However, it will be observed from the report of the proceedings in the case in the trial court (9 F. Supp. 986-988) that the plaintiff therein had asserted a claim against a receivership for compensation for attorney's services and had sought to recover the same in the trial court without adducing evidence in support of his claim. As we construe the case, the appellate court, in its opinion (75 F. (2d) 713) remanded the case to the trial court primarily for the purpose of affording the plaintiff an opportunity to adduce evidence to show the services rendered and the value of the same. Under such circumstances (*i. e.*, involving a trial upon the facts), the court would necessarily have to make appropriate findings. It is obvious that the case would have no application, even by analogy, to the instant case, where no substantial issues of fact are involved.

On page 14 of appellant's brief is cited *Clarke v. Gold Dust Corporation*, (C. C. A. 3rd, 1937) 91 F. (2d) 12, where the appellate court remanded the case to the

trial court for findings of fact and conclusions of law as required by Equity Rule 70½. The case as there reported does not disclose the situation that such findings were necessary by reason of the fact that the case was tried upon issues of fact and testimony taken. The real situation is disclosed, however, upon the second appeal of the case reported in 106 F. (2d) 598, 599, where the appellate court, in its opinion referring to the original trial, stated that:

“Hearing was had at which various documentary exhibits relating to the status of the two companies were introduced in evidence and oral testimony was taken.”

Of course, under such circumstances it was necessary to have the findings by the trial court.

Even if it should be concluded that it would have been preferable or more appropriate for findings of fact to have been made by the court below, the failure to do so does not require that the judgment of the trial court be reversed. See *Shellman v. Shellman*, 68 App. D. C. 197, 198; 95 F. (2d) 108; *Goodacre v. Panagopoulos*, (App. D. C. 1940), 110 F. (2d) 716, 718.

In conclusion upon this point, it may be observed that under well settled doctrine, the decision of the court below may be sustained, not only upon any one or all of the points raised by the motion to dismiss, but upon any other ground which this court may determine, from the record, properly supports the decision of the court below. See *J. E. Riley Investment Co. v. Commissioner of Internal Revenue*, (No. 50, U. S. S. Ct., Nov. 12, 1940); *Capital Apartment Corporation v. Vassos*, (App. D. C. 1933) 65 F. (2d) 482, 483; *White v. Central Dispensary and Emergency Hospital*,

(App. D. C. 1938) 99 F. (2d) 355, 360; *Helvering, Commissioner of Internal Revenue v. Gowran*, 302 U. S. 238, 246; *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co. et al.*, 293 U. S. 268, 281; *Lewis-Hall Iron Works v. Blair, Commissioner of Internal Revenue*, (App. D. C. 1928) 23 F. (2d) 972, 974; *Maxwell v. Brayshaw*, 258 Fed. 957, 959.

REBUTTAL BRIEF OF APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1940.

No. 7614

CYNTHIA MILLS CLEVELAND, *Appellant.*

v.

PRESTON DELANO, COMPTROLLER OF THE
CURRENCY, *Appellee.*

GEORGE P. BARSE.

Attorney for Appellee.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1940.

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CYNTHIA MILLS CLEVELAND, *Appellant*,

v.

PRESTON DELANO, COMPTROLLER OF THE
CURRENCY, *Appellee*.

REBUTTAL BRIEF OF APPELLEE.

A.

PRELIMINARY STATEMENT.

Under date of February 10, 1941, this Honorable Court granted appellant's motion for leave to add to the record in the instant case a portion of certain proceedings had on January 13-14, 1941, before the Honorable Johnson J. Hayes, District Judge, specially presiding in Detroit, Michigan. These proceedings involved the trial upon the merits of a number of cases, represented by Mr. Lucking, including Causes numbered 8333 and 606 (hereinafter more fully

mentioned), involving enforcement against the defendants therein of the same stock assessment liability levied by the Comptroller of the Currency against the shareholders of the First National Bank-Detroit, which appellant, in the instant case, and also in said proceedings in Detroit, has sought to avoid on the ground of the operation of the Michigan statute of limitations. The material added to the record in the instant case by the aforesaid motion of appellant comprises the receiver's "Statement of Condition-First National Bank-Detroit as of the close of business December 31, 1940," and also certain testimony of one Ernest H. Fontaine, Assistant to the Receiver, relating to the aforesaid statement of condition. The stated purpose of appellant under said motion was to utilize said material in support of the defense of statute of limitations which is also being set up in the instant case.

Appellant had also theretofore filed a reply brief setting forth on pages 24 and 25 certain extracts from said hearings before Mr. Justice Hayes, wherein he rendered his decision upon the merits in the Detroit cases denying the defense of statute of limitations and holding the defendants liable, after consideration, *inter alia*, of the aforesaid statement of condition and said testimony of Mr. Fontaine.

The Comptroller of the Currency, as appellee, also filed, in the instant case, on the day before the oral argument, a motion to supplement the record by the addition thereto of a transcript of the pleadings and proceedings, and of the hearing before Mr. Justice Hayes, in Causes numbered, respectively, 8333, *Schram, Receiver v. Guardian Trust Company* (wherein the receiver sued the trust company as trustee of the Mills Estate,—of which appellant is the sole beneficiary,—to recover the identical assessment liability involved in the instant case) and No. 606,—*Cynthia Mills Cleveland v. First National Bank-Detroit* (wherein appellant sought to enjoin the receiver from the collection of said stock assessment upon the grounds, *inter alia*, of the operation of the statute of limitations, as in the instant case). This motion was consented to by opposing counsel in open

court and leave was thereupon granted that the same be filed.

A few days subsequent to the trial, in accordance with previous oral understanding, counsel for appellant and for appellee filed in the Clerk's office a stipulation providing, *inter alia*, that:

“(2) The issues presented in the instant case may be considered as restricted to the question of,—

Whether the collection of the assessment against appellant in the instant case is barred under the provisions of numbered paragraph 2 of Section 13976 of the C. L. of Michigan of 1929 (quoted p. 18 appellant's Reply Brief)

to the extent that said question may be considered as properly presented, and as pertinent and relevant under the facts of the case and the law applicable thereto, subject, however, to the contentions for and against said question, submitted in the course of the oral argument this day had in said cause, and to the contentions and points relating to said question contained or to be contained in the briefs filed or to be filed, respectively, by counsel.

It is understood by counsel herein that this stipulation can in no way foreclose, nor in any way affect, the basis upon which this Honorable Court may, in its discretion, decide and dispose of the case.”

Said stipulation further provided that counsel for appellee does not contend that the decisions rendered and orders entered by Mr. Justice Hayes in said causes numbered 606 and 8333, respectively, are, or have the legal effect of being, *res adjudicata* as to the issues presented for decision in the instant case but that counsel for appellee should be entitled to cite and rely upon said decision and orders as legal precedents to the extent considered pertinent to the issues presented in the instant case.

In view of the fact that all of the foregoing matters transpired subsequent to the filing of appellee's original brief, it is deemed appropriate and advisable that this rebuttal brief be filed by appellee, and it was understood at the time

of oral argument and subsequent thereto, that counsel for appellant indicated that he would have no objection to the filing of the same.

B.

SUMMARY OF ARGUMENT.

I. The national banking laws contemplate that the statutory assessment liability of the shareholders of a national bank shall be enforced for the purpose of applying the proceeds thereof toward the prompt payment of the debts and obligations of the receivership bank without awaiting final liquidation of the assets, notwithstanding the assets may be of value to yield, ultimately, an amount sufficient to pay all of such debts and obligations exclusive of the amount collectible from the assessment. Therefore, the fact, in the instant case, that the assets are estimated to be sufficient in value to yield in ultimate liquidation enough to equal the entire amount of liabilities does not cause the collection of the assessment to be tantamount to the collection of a surplus fund for the payment of interest to the depositors, inasmuch as said uncollected assessment is necessary to obtain funds with which to make prompt repayment of the sum of \$31,600,000 borrowed by the receiver from the Reconstruction Finance Corporation for the purpose of paying a dividend to the depositors.

II. The Reconstruction Finance Corporation must be considered as equitably subrogated to the rights of the depositors and other creditors whose dividend of 20% was paid in part from the funds advanced by that Corporation, and the resultant liability of the Receiver to the Corporation must be considered as substituted, pro tanto, for the corresponding amount of the Receiver's liability to the depositors and other creditors thus paid from the proceeds of said loan. The collection of such assessment is, therefore, in final analysis and in legal effect, for the purpose of paying the debts and obligations of the bank, through the receiver,

and does not constitute collection of the assessment for the purpose of paying interest to the depositors and other creditors, inasmuch as the proceeds of collection are to be applied toward the repayment of said loan. Hence no question of the operation of the Michigan statute of limitations can properly arise.

C.

ARGUMENT.

I. The national banking laws contemplate that the statutory assessment liability of the shareholders of a national bank shall be enforced for the purpose of applying the proceeds thereof toward the prompt payment of the debts and obligations of the receivership bank without awaiting final liquidation of the assets, notwithstanding the assets may be of value to yield, ultimately, an amount sufficient to pay all of such debts and obligations exclusive of the amount collectible from the assessment. Therefore, the fact, in the instant case, that the assets are estimated to be sufficient in value to yield in ultimate liquidation enough to equal the entire amount of liabilities does not cause the collection of the assessment to be tantamount to the collection of a surplus fund for the payment of interest to the depositors, inasmuch as said uncollected assessment is necessary to obtain funds with which to make prompt repayment of the sum of \$31,600,000 borrowed by the receiver from the Reconstruction Finance Corporation for the purpose of paying a dividend to the depositors.

Section 5234 of the Rev. Stat. (Sec. 192, title 12, U. S. C.) provides that the receiver of a national bank "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders". Section 3 of the Act of June 30, 1876, as amended (sec. 197, title 12 U. S. C.) provides that after the Comptroller of the Currency shall have paid the depositors and other creditors of a national bank in receivership, by dividends from time to time de-

clared (under Sec. 5236 Rev. Stat.; sec. 194, Title 12 U. S. C.) the full amount of the claims of such depositors and other creditors,—a shareholders' agent shall be elected who shall take over the surplus or remaining assets of the receivership, and that said remaining assets, when liquidated, shall be applied:

“Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

“Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent.” (p. 456 U.S.C. Title 12.)

It is obvious in view of the foregoing, that Congress definitely contemplated that the assets of the receivership bank might well be of such value as to yield, ultimately, by liquidation over a period of time, sufficient not only to pay the debts and obligations of the bank in full, but to result in a surplus. It is further obvious that Congress contemplated that such fact of ultimate sufficiency of the assets to pay all claims in full, was not intended to prevent the prompt interim collection of the assessment liability of the shareholders inasmuch as the quoted extracts from Section 3 of the Act of June 30, 1876, *supra*, expressly recognized and anticipated the contingency that notwithstanding a surplus amount of unliquidated assets may remain after payment of the depositors and other creditors in full, such payment may have been made possible in part by the enforcement of the assessment liability, and consequently said statute specified that the shareholders who had paid their assessments should *first* be reimbursed from said surplus prior to the ratable distribution of the proceeds of the surplus among the shareholders generally.

This construction of the statutes in the foregoing respects may be noted from the language of the Supreme Court of the United States in *Adams v. Nagle, et al.*, 303 U. S. 532, 544:

“5. If the Comptroller’s decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. Moreover, if, as they assert, the Comptroller’s judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the creditors, the protection of whose interests is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors.” (Page 544). (The *Nagle* case is discussed at length in Appellee’s main brief pp. 8-12.)

It therefore follows, in view of the foregoing, that even if it be assumed, for discussion only, that the receiver’s statement of December 31, 1940 (added to the record by Appellant’s motion) indicates that the remaining assets of the receivership may be sufficient to yield, ultimately, more than enough to meet the outstanding liabilities of the receivership, such assumed fact would not be a legal defense against the immediate enforcement of the assessment liability of appellant. However, it is proper to point out, in this connection, that the aforesaid statement of the receiver indicates, in the note appearing in the lower left-hand portion thereof, that:

“The above figures as to estimated values represent the Receiver’s *present* estimate of the *ultimate liquidation value* of these items. Accordingly, these values are not guaranteed by either the Receiver or the Comp-

troller of the Currency, and they should not be accepted by the depositor as final either as a basis of prospective dividends or otherwise." (Italics inserted)

The outcome of liquidation of assets is necessarily affected by many uncertain and unknown factors, particularly in view of the rapidly changing conditions and unpredictable events in domestic and foreign affairs of the present day, and hence it is entirely problematical as to whether the remaining assets will ultimately yield sufficient to repay the outstanding loan due the Reconstruction Finance Corporation of \$31,600,000 in addition to meeting the other liabilities set up in the receiver's aforesaid statement of condition by way of reserves to meet claims not yet proved, amounting to over \$1,000,000, and funds held in the Trustee for Owners' Account of approximately \$555,000, etc.

II. The Reconstruction Finance Corporation must be considered as equitably subrogated to the rights of the depositors and other creditors whose dividend of 20% was paid in part from the funds advanced by that Corporation, and the resultant liability of the Receiver to the Corporation must be considered as substituted, pro tanto, for the corresponding amount of the Receiver's liability to the depositors and other creditors thus paid from the proceeds of said loan. The collection of such assessment is, therefore, in final analysis and in legal effect, for the purpose of paying the debts and obligations of the bank, through the receiver, and does not constitute collection of the assessment for the purpose of paying interest to the depositors and other creditors, inasmuch as the proceeds of collection are to be applied toward the repayment of said loan. Hence no question of the operation of the Michigan statute of limitations can properly arise.

In connection with the aforesaid Reconstruction Finance Corporation loan may be noted the following extract from the testimony of Assistant Receiver Fontaine in the hearing before Mr. Justice Hayes in Detroit as reproduced on

page 6 of appellant's motion to supplement the record in the instant case:

"The Court: Let the court ask this witness one other question: you say you, the receiver, owe the Reconstruction Finance Corporation approximately \$31,000,000?

A. \$31,000,000 as of December 31st.

Q. And to secure that you pledged to the Reconstruction Finance Corporation your collections from all sources on the assets of this bank?

A. Yes.

Q. What was that \$31,000,000 for? To pay a dividend?

A. We paid the dividend of 20 per cent which totaled \$67,000,000, and the dividend was declared in November.

Q. And you borrowed the money from Reconstruction Finance Corporation to pay it?

A. Yes, we had \$30,000,000 cash on hand and had to borrow the difference."

The payment of the 20 per cent dividend to the depositors and other creditors was made possible only by the advancement of \$31,600,000 by the Reconstruction Finance Corporation. Otherwise, the payment of the dividend would have had to await further liquidation of the assets. Consequently, it seems clear that not only is the Corporation subrogated to the position of the recipients of the dividend, but the repayment of that loan is, in legal effect, under familiar principles, tantamount to a payment of the dividend.

It will be noted from the aforesaid receiver's statement of condition as of December 31, 1940 that the face amount of the stock assessment liability was \$25,000,000, and that approximately \$18,581,000 has been collected from the other shareholders of the bank, leaving an unpaid balance of stock assessment liability of approximately \$6,000,000 including the assessment liability of \$65,000.00 (R. 6) due from appellant. *It will also be noted from the aforesaid statement of condition of December 31, 1940 that the receiver had on hand in cash at that time only \$420,566.14.*

It is therefore perfectly obvious that even if the entire amount of approximately \$6,000,000 of unpaid stock assessment liability should be collected, it will still be insufficient to repay the Reconstruction Finance Corporation loan of \$31,600,000.

Under these circumstances, it seems clear that the receiver's suit against the appellant in Cause No. 8333, filed and pending in Detroit, was for the purpose of collecting a stock assessment to pay outstanding unpaid obligations of the receivership, and that it was not for the purpose of collecting a surplus fund to use as interest to the depositors and other creditors of the bank. This is the conclusion reached by Mr. Justice Hayes in said **Equity Cause No. 8333** filed against appellant by receiver, wherein (as quoted on page 25 of "Appellant Cleveland's Reply Brief"), the court said:

"The Court: In Equity No. 8268, 493 Civil and *Equity 8333* and Equity 8511 and Civil 1071, on the defense of the statute of limitations, in which the several defendants have pleaded the Michigan three-year statute, the court is of the opinion and so holds that the three-year statute of limitations does not apply to these suits, for the reason that these suits are to recover stock assessments on account of the insolvency of a national bank, and are not suits or actions to recover damages to person or property, to which the three-year statute is applicable. * * *" (Transcript, pp. 192, 195, 196) (Italics inserted)

It would seem reasonable to assume that there has been sufficient litigation upon the precise issue involved in the instant case, to justify the conclusion that it should now be considered thoroughly tested and that the contentions of appellant in this respect are unsound. The defense of statute of limitations has been determined adversely to said contentions by the United States District Court at Detroit in three cases which were subsequently affirmed by the United States Court of Appeals for the Sixth Circuit: *Davis v. Schram*, (C. C. A. 6th, 1940) 111 F. (2d) 144; Cer-

tiorari Denied, 85 L. Ed. Ad. Op. 60; *Wolf v. Schram*, (C. C. A. 6th, 1940) 111 F. (2d) 146; Certiorari Denied, 85 L. Ed. Ad. Op. 60 (discussed in appellee's main brief, p. 17, *et seq.*); and *William Alfred Lucking, et al. v. Schram, Receiver*, 31 F. Supp. 749, 753, affirmed — F. (2d) — (discussed in appellee's main brief, p. 19, *et seq.*, copy of C. C. A. opinion in Appendix hereof, p. 13). As to said case of *Lucking v. Schram, Receiver*, it will be noted that while the District Court (31 F. Supp. at 753) specifically passed upon the statute of limitations defense (see quotation therefrom, p. 19, appellee's main brief), the Court of Appeals did not, in its opinion, specifically discuss the statute of limitations defense. It must be assumed, that inasmuch as this issue was raised on appeal, the court did consider it, but in any event it follows that the adjudication of the trial court upon this issue must stand in view of the fact that the decision of the trial court was affirmed.

The defense of the statute of limitations has also been passed upon by Mr. Justice Hayes in at least five cases decided by him on January 14, 1941 adversely to such defense as appears from the above quoted extract from his opinion appearing herein, *supra*, page 10.

Appellant filed the instant suit in the District Court of the United States for the District of Columbia, on the ground, *inter alia*, that she had been prevented, in the Detroit actions, from setting up the defense of statute of limitations by reason of alleged concerted improper action on the part of the Comptroller of the Currency and the receiver. A reference to appellee's aforesaid motion to add to the record in the instant case, the transcript of the proceedings and of the hearings in said Detroit cases (Causes numbered 8333 and 606, respectively) will disclose that:

(a) Appellant was in error, and under clear misapprehension, in alleging in her bill of complaint, and in contending in her briefs herein filed, that she had been prevented in said proceedings by concerted action of the Comptroller of the Currency and the receiver of said bank, or otherwise, in setting up in said Detroit

proceedings her defenses as to the statute of limitations. (Summarized on pages 23-24 of Appellant's brief); and

(b) That appellant has had full hearing upon the merits as to her contentions in the foregoing respects, in said Detroit proceedings, and that Mr. Justice Hayes has decided the issues in regard thereto adversely to said contentions.

It is therefore respectfully submitted that the judgment of the court below in the instant case should be affirmed.

Respectfully,

GEORGE P. BARSE,
Attorney for Appellee.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

Filed Jan 9-1941 John W. Menzies, Clerk

NO. 8661

WILLIAM ALFRED LUCKING and DEAN
LUCKING, Administrators W.W.A.
of the Estate of Alfred Lucking,
Deceased,

Appellants,

v.

B. C. SCHRAM, Receiver of FIRST
NATIONAL BANK-DETROIT, a Na-
tional Banking Association,
Appellee.

APPEAL from the
United States
District Court
for the Eastern
District of Mich-
igan, Southern
Division.

Decided January 9, 1941.

Before HICKS, ALLEN and HAMILTON, Circuit Judges.

ALLEN, Circuit Judge. This appeal arises out of an action by the receiver of First National Bank-Detroit, an insolvent national bank, to enforce liability for an assessment levied upon the shareholders under Title 12, § 66, U. S. C. Appellants counterclaimed, praying for rescission and equitable relief. The counterclaim sets forth that appellants, administrators of the estate of Alfred Lucking, through an exchange of twenty shares of stock of the Detroit & Security Trust Company, on February 7, 1930, acquired two hundred shares of stock of Detroit Bankers Company (hereinafter called the holding company), and prays that this exchange be rescinded. The District Court dismissed the counterclaim and gave judgment against appellants for their proportionate share of the assessment.

The questions arising out of the receiver's petition are identical with those covered by the decision of this court in *Barbour v. Thomas*, 86 Fed. (2d) 510, a class suit, which held that stockholders of the holding company are liable for assessments made upon the stock of its constituent banks. Appellants, as stockholders of the holding company, are therefore liable for assessments on behalf of First National Bank-Detroit. *Davis v. Schram*, 111 Fed. (2d) 144 (C. C. A. 6); *Wolf v. Schram*, 111 Fed. (2d) 146 (C. C. A. 6); *MacPherson v. Schram*, 112 Fed. (2d) 674, 675 (C. C. A. 5). It is unnecessary to elaborate appellants' liability further, as all such material questions were decided in *Barbour v. Thomas* and in the companion case of *Ullrich v. Thomas*, 86 Fed. (2d) 678.

The principal questions are those arising out of the counterclaim for rescission. Appellants prayed for rescission and the return of the original stock, upon the ground that they made a mistake of law when they exchanged the shares in Detroit & Security Trust Company for shares in the holding company. They state that they expected to receive shares in a company which would actually own the shares in the individual banks taken over by the holding company, and not until the decision of the District Court in *Barbour v. Thomas*, 7 Fed. Supp. 271, announced in 1933, were they apprised that the holders of the holding company stock were subject to the assessment for shares of the individual banks acquired by the holding company in 1929 and 1930. Clearly these allegations do not entitle appellants to succeed in their prayer for rescission. Under Michigan law, controlling here, this relief cannot be granted upon the ground of mere mistake of law. *Martin v. Hamlin*, 18 Mich. 354; *Lapp v. Lapp*, 43 Mich. 287; *Ingles v. Bryant*, 117 Mich. 113; *Pittsburgh etc. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109. In the latter case both parties, in making the contract, relied upon a former decision of the Supreme Court of Michigan. This decision was later overruled by that court, and rescission of the contract was sought upon the ground of mistake of law. The court held that as the case contained no elements of misrepresentation, imposition, suppression, undue influence, imbecility, or surprise, it did not fall within any exception to the rule that a mistake of law does not furnish any ground for relief.

The District Court held that appellants had not exerted due diligence in the assertion of their claimed right of rescission. With this conclusion we agree. Appellants are attorneys, who had read and considered the legal effect of the agreement for the exchange of shares of the Detroit & Security Trust Company for shares of the holding company. It provided:

“The Common stock issued by said corporation [the holding company] shall be subject to the same liability as shares of the capital stock of a bank and/or trust company organized in Michigan, and/or shares of capital stock of a national bank.”

This provision of the contract was carried out by being incorporated in the articles of association, Art. IX(A), which reads as follows:

“The holder of each share of common stock of this corporation shall be individually and severally liable for such stockholders’ ratable and proportionate part (determined on the basis of their respective stock holdings of the total issued and outstanding stock of this corporation) for any statutory liability imposed upon this corporation by reason of its ownership of shares of the capital stock of any bank or trust company, and the stockholders of this company, by the acceptance of their certificates of stock in this company, severally agree that such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized to operate. A list of the stockholders of this company shall be filed with the banking commissioner and the Comptroller of the Currency whenever requested by either of those officers.”

The clause was also printed on the reverse side of each stock certificate issued by the holding company. The assent of the stockholders to this provision was manifested by the acceptance of the stock. *Barbour v. Thomas, supra*, at 517; *Backus v. Connolly*, 268 Mich. 495. In 1933 appellants were aware that the receiver would enforce this liability, and one of them took an active part in the prosecution of the *Ulrich*

case, *supra*. Having received dividends of \$1,600 on the holding company stock, appellants stood by for five years after the District Court's decision in *Barbour v. Thomas*, *supra*, and failed to repudiate the contract of exchange until they filed their counterclaim in December, 1939. Now they seek equitable relief; but equity aids the vigilant, and not those who slumber on their rights. *Mogk v. Stroecker*, 243 Mich. 668; *Hope v. Detroit Trust Co.*, 275 Mich. 213; *Kipp v. State Highway Commissioner*, 286 Mich. 202; *Henderson v. Connolly's Estate*, 294 Mich. 1.

The situation of the parties had changed during this period of delay. Some three years had elapsed between the exchange of the stock and the date of the bank's insolvency, and the rights of third parties had intervened. The stockholders, creditors, and depositors of the constituent banks of the holding company had changed their position in reliance upon the agreement. Undoubtedly the First National Bank-Detroit, carrying on active business during this time, had incurred new obligations, and under Art. IX(A) of the agreement made in the exchange of the stock, new creditors had a right to rely upon the statutory liability of the appellants for assessment upon the stock of the constituent banks. Hence the equities preponderate in favor of the receiver. *Thompson v. American State Bank*, 256 Mich. 245. Under the circumstances the delay was unreasonable. This ruling rests upon "the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance." *Hays v. Port of Seattle*, 251 U. S. 233, 239.

In conclusion, we note that appellants received exactly what they bargained for, and suffered no financial damage. At the time of the exchange the total value of the stock acquired was equal to that of the stock surrendered, and up to April, 1930, the holding company stock sold at a considerable advance in market price. After all, the underlying reason for this controversy is that appellants, when sued for their proportionate share of the stock assessment, and not before, decided to repudiate the agreement. But rescission cannot be granted merely because one of the parties is disappointed in the results of a contract.

The judgment and decree are affirmed.

APPELLANT'S REPLY TO APPELLEE'S
REBUTTAL BRIEF

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 7614

CYNTHIA MILLS CLEVELAND, *Appellant*
vs.
PRESTON DELANO, Comptroller of the Currency,
Appellee

An Appeal From a Judgment and Order Dismissing the
Cause in the District Court of the United States
for the District of Columbia

ALBERT W. FOX
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7614.

CYNTHIA MILLS CLEVELAND, *Appellant*

vs.

PRESTON DELANO, Comptroller of the Currency,
Appellee

**APPELLANT'S REPLY TO APPELLEE
COMPTROLLER'S REBUTTAL BRIEF.**

Appellant Cleveland has argued fully her position and contention that the Receiver's suit against her father's Estate is

one to collect damages (interest) for the detention of the First National Bank-Detroit's deposits—after the closing of the Bank in February, 1933, and is, therefore, barred by the three-year Statute of Limitations of Michigan.

See pages 5 to 22 of appellant Cleveland's Reply Brief.

Appellee Comptroller of the Currency, in his Rebuttal Brief—makes but three points against Appellant's defense of the Statute of Limitations, namely:

1st—The Comptroller's Counsel cite, on page 7, the case of *Adams v. Nagle*, 303 U. S. 532

We beg to discuss *Cressey v. Meyer* (cited on page 26 of Appellant's reply brief) at length—believing it to be controlling of this appeal.

In *Cressey v. Meyer, supra*, the facts were that:

(a) In 1827 the State of Louisiana passed an Act incorporating the Planters Bank—

(b) The State issued its own negotiable bonds—to the Bank—thus contributing the capital—and secured them by individual subscriptions to stock in turn secured by real estate mortgages.

(c) The Bank failed in 1842.

(d) By the Act of 1843—the State took over the Bank's management.

(e) By the Act of 1847—the State extended maturities of bonds—and provided that subscribers to Bank's shares could pay their subscriptions over seventeen years—*so far as necessary to pay the bonds due the State.*

(f) An assessment was ordered on the Bank's shares—payable in seventeen annual payments.

(g) In 1883—Cressey—an alien—filed a bill against the Bank and a large number of its stockholders—

claiming to own certain bonds and seeking to charge the stockholders with unpaid parts of their subscriptions—under the 1847 Act and settlement.

(h) The State was a party by intervention—
The Supreme Court in its opinion, held:

- (1) This was an action by a creditor of the State.
- (2) against the State's debtors.
- (3) to obtain their debts to the State—to pay the state's obligations on the bonds to plaintiff.

The Supreme Court saying:

“* * * It is a proceeding of a garnishee nature. The appearance of the State, voluntarily, its application to be made a party *pro interesse suo*, may avoid

all questions as to the right of the plaintiff to maintain this suit. Conceding that such a suit is proper, it still remains in the nature of a personal action by one individual against another. As against such a suit, laches and limitations are in a court of equity sufficient defences. The settlement, which was practically between the State and its debtors, was made in 1847. Thirty-six years thereafter this bill is filed. If the time for full payment given by the settlement of 1847 is subtracted, this suit was commenced nineteen years after the time fixed by that settlement for the last payment had passed. Limitation and laches forbid that this suit should be sustained. It may be that, as against the sovereign, no statutes of limitation run; and it may be that, in the courts of Louisiana, the State may enforce all obligations due to it no matter what period of time may have intervened since they were assumed; but that right is personal to the sovereign; it does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the statute of limitation and the defence of laches. Whatever, therefore, might be true if the State of Louisiana were suing in its own courts, this suit must be treated in the federal courts as one by an individual against individuals: * * *

The Conclusion as to the three cases of—

United States v. Beebe, 127 U. S. 338

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is that even though the United States and the State were Plaintiffs, yet the Courts—in applying the Statute of Limitations *will seek*—

(1) Real party in interest

(2) Use of recovery—whether public or private.

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1st—The Comptroller's Counsel cite, on page 7, the case of *Adams v. Nagle*, 303 U. S. 532

2nd—That “it is entirely problematical” as to whether the Bank’s remaining assets will realize \$31,600,000 borrowed from the Reconstruction Finance Corporation—and \$1,555,000 contingent claims—

See pages of Appellee’s Rebuttal—8 and 9.

3rd—That Judge Hayes in January, 1941—decided the defense of the Statute of Limitations adversely to appellant Cleveland’s contentions in her reply brief at pages 5 to 22.

Let us discuss appellee Comptroller’s three points briefly—

1st—The case of *Adams v. Nagle* in 303 U. S. 532, has no bearing or value—on the defense of the Statute of Limitations.

No such question was raised in the *Adams v. Nagle* case.

It was decided in March, 1938—
and merely held that—

(1) The Comptroller’s assessment could not be attacked collaterally—where the Comptroller was not a party, and

(2) It was no defense to the collection of the assessment that other assets of the closed Bank had not been first exhausted—

NO question of the Receiver’s suit being barred by the Statute of Limitations was involved.

This Honorable Court of Appeals has decided several times—since *Adams v. Nagle*—the question of the defense of the Statute of Limitations on its merits—and

has never considered that *Adams v. Nagle* prevented the pleading of such a defense.

See—

Moran vs. Cobb, No. 7462, Court of Appeals,
D. C.

2nd—The second point of the Appellee Comptroller is that *maybe* the remaining assets of the Bank will not sell for \$34,000,000—and begs the one important question of fact on this appeal.

(a) Appellant Cleveland has just moved that the three appraisals by the Comptroller—showing over \$63,000,000 of assets, be considered by this Court on this appeal.

(b) Appellee Comptroller—by his motion to dismiss admitted the fact that his Receiver's suit was one to collect interest on these deposits.

(c) A dignified, consistent position now for the Comptroller to take with this Honorable Court would be—

(1) Either admit this fact now—since it is proved by these three recent appraisals,

(2) Or consent that the case be sent back to the Lower Court to take proofs—which would be only the simplest justice to appellant Cleveland.

3rd Point—That Judge Hayes only decided this question of the Three-Year Statute of Limitations of Michigan—in an off-hand manner and without any study whatever—is shown by his remarks quoted in appellant Cleveland's Reply Brief at page 25 thereof.

In fact the case of—

Cressey v. Meyer, 138 U. S. 525

is a complete answer to Judge Hayes' decision.

We beg to discuss *Cressey v. Meyer* (cited on page 26 of Appellant's reply brief) at length—believing it to be controlling of this appeal.

In *Cressey v. Meyer, supra*, the facts were that:

(a) In 1827 the State of Louisiana passed an Act incorporating the Planters Bank—

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The Supreme Court saying:

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The *Hurst* case, *supra*, is directly in point because it involved the Michigan Statute of Limitations—and

the Michigan Supreme Court held that there could be no recovery against the surety on its bond—since there could be no recovery against the principal on the bond—who was the sheriff—because any suit for false imprisonment—brought against the Sheriff was barred by the two-year Statute of Limitations—

and, therefore, no suit against the surety could be maintained—even though a ten-year Statute of Limitations applied to suits upon bonds generally.

Applying this Rule—we find that—

(a) Since a Depositor could not recover against First National Bank-Detroit—in a suit for interest as damages—after three Years had elapsed—

no more so could a depositor's agent—the Receiver—so recover—, against the Bank—

and so could not recover against the secondarily liable stockholder.

IN CONCLUSION of this Reply Brief of appellant to the Comptroller's Rebuttal Brief—

we believe that this Honorable Court will see very clearly that the Comptroller's Rebuttal Brief is a practical admission that appellant Cleveland's contention that the Three-Year Statute of Limitations applies—

cannot be answered by the Comptroller—on the merits.

Respectfully submitted,

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To *Cressey v. Meyer, supra*, the appellee, Comptroller, can only answer (as did Judge Hayes)—Well, conceding that if an individual were bringing suit against the Mills Estate (appellant's father) for interest on closed

Bank deposits, it would be considered that the three-year Statute applies—

Yet Judge Hayes reasoned, there is something peculiar about a receiver's suit to collect assessments—even though he is a mere agent for the Depositor Creditors.

It is noticeable that neither the Comptroller's counsel in their rebuttal brief—nor Judge Hayes in his remarks in deciding the Detroit case—could give any reason or grounds for such a conclusion.

Appellant Cleveland submits that such a claim is completely answered by *Richmond v. Irons*, 121 U. S. 27, 64 (referred to by appellant on page 14 of her reply brief) where the Supreme Court expressly held that if a National Bank stockholder is to be liable for interest on the closed bank deposits—after its closing—it must be because such a claim could have been urged against the Bank itself—as a contract or debt or engagement of the Bank itself.

As the Supreme Court of the United States said in *McDonald v. Thompson*, 184 U. S. 71, (see page 15 of appellant's reply brief) where a defendant stockholder pleads the Statute of Limitations, the Receiver must show—

“that there were outstanding claims against the bank which were not barred by the Statute. * * *”

These rules being now accepted as conclusive—where the Statute of Limitations is pleaded—appellant Cleveland respectfully submits that the case of *Hurst v. Charron*, 267 Mich. page 210, referred to at length in appellant Cleveland's reply brief at pages 20 to 22—is controlling on this appeal, since it holds squarely that there can be no recovery against a person secondarily liable, such as a surety or a stockholder—unless the principal, that is the Sheriff in the Hurst Case, or the Bank in this case—was first liable.

The *Hurst* case, *supra*, is directly in point because it involved the Michigan Statute of Limitations—and

the Michigan Supreme Court held that there could be no recovery against the surety on its bond—since there could be no recovery against the principal on the bond—who was the sheriff—because any suit for false imprisonment—brought against the Sheriff was barred by the two-year Statute of Limitations—

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IN CONCLUSION of this Reply Brief of appellant to the Comptroller's Rebuttal Brief—

we believe that this Honorable Court will see very clearly that the Comptroller's Rebuttal Brief is a practical admission that appellant Cleveland's contention that the Three-Year Statute of Limitations applies—

cannot be answered by the Comptroller—on the merits.

Respectfully submitted,

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APPELLANT CLEVELAND'S REPLY BRIEF.

Appellant Cleveland concluded her main brief, by asking a reversal of the Lower Court's judgment of dismissal on the following grounds, namely:

(a) No findings of fact or opinion were filed by the District Judge—

(b) The plaintiff is entitled as a matter of simple right, to defend her interests in her father's estate by proof of the facts supporting the defense of the Statute of Limitations of Michigan—in an action where the Comptroller of the Currency is a party—

so that his Receiver of First National Bank—Detroit cannot make the technical defense that such facts (that assets in his hands more than equal 100 cents on the dollar) cannot be proved in the absence of the Comptroller—

(c) The evasive tactics of the Comptroller of the Currency as outlined in appellant's Points on appeal No. IV, R. 71, should be enjoined—and the

Comptroller should be directed to enter the Michigan District Courts and try the plaintiff's defense of the Statute of Limitations on the merits.

Appellee Comptroller of the Currency argued in his brief that—

“(2) The factual matters appearing in the bill of complaint do not support appellant's allegations in the bill that the assets of the receivership bank are sufficient to pay the claims against it in full, nor to pay 100 per cent of the principal of such claims.”

(p. 13.)

“(3) The contention of appellant that the suit to collect the assessment is in effect a suit to collect interest by way of damages and as such is barred by the Michigan statute of limitations, is without substance and is unsound. The cases of Schram v. Wolf and Schram v. Davis referred to by appellant hold squarely against such contention.

The theory of appellant with reference to the application of the Michigan statute of limitations is, as previously indicated (*supra*, p. 7) summarized on page 24 of her brief and is as follows:

“(a) As a matter of fact, the Receiver has more than sufficient assets with which to pay one hundred cents on the dollar to all depositors,

“(b) Without collecting any claimed assessment liability from the Mills Estate,

“(c) That, therefore, the attempt to collect from the Mills Estate is essentially a suit to collect and pay interest on the deposits—from the closing of the Bank—and that

“(d) such a suit is, therefore, one for damages for injuries (that is detention) to property—

“See—

Ticonic National Bank v. Sprague, 303 U. S. 406, 410.”

‘(e) And, therefore, barred by the three year Statute of Limitations of Michigan—.’ ”

“The major premise of the foregoing argument is the assumption that the assets are sufficient to pay ‘100 cents on the dollar to all depositors.’ We have previously indicated (*supra* p. 71) that this assumption, as a matter of defense, constitutes a collateral attack and cannot be raised to defeat the assessment. We have also indicated (*supra* p. 13) that on the face of the record, as shown by appellant’s original and amended bill of complaint, the contention as to the sufficiency of the assets to pay 100 per cent of principal is not supported by the factual matters therein set forth.”

(pp. 15, 16.)

Or—to put the main Question on this Appeal differently:

(a) Appellant Cleveland contended in her main brief that she should have been permitted to prove that the Receiver had sufficient assets to pay 100 cents on the dollar to all creditors—

therefore, in trying to collect an assessment from her father’s (Mills) Estate of \$65,000—the Receiver was merely collecting money to pay interest to depositors—who had already received their full 100 per cent, or principal, of the deposits from other assets in the hands of the Receiver—

And Appellant Cleveland, thereupon contended, that the collection of interest (or damages for the detention of the deposits) was barred by the three year Statute of Limitations of Michigan.

But—to defeat appellant Cleveland’s defense of the Statute of Limitations, on a technicality—

the Counsel for the Comptroller try to contend:

1st—It is a collateral attack on the assessment order of the Comptroller—for appellant Cleveland to show that the use and purpose of collecting \$65,000

from her father's Estate—is to pay interest or damages—and

2nd—That as a matter of fact the Receiver hasn't enough other assets to pay all depositors their 100 cents on the dollar.

And to prevent appellant Cleveland interposing the defense of the Statute of Limitations of Michigan—the appellee Comptroller has sought throughout his brief, to make this Honorable Court of Appeals believe, that the appellee Comptroller's motion to dismiss does not admit the fact necessary for appellant's defense of the Statute of Limitations, namely—

sufficient other assets to pay all depositors in full one hundred cents on the dollar—

But the Complaint (admitted by the motion to dismiss) does clearly so allege—

See paragraphs 17, 18 and 19 R. 9 & 10.

The Proof is now before this Court—

But now this Court of Appeals has proof positive—by the showing made by appellant's motion to supplement the Record on Appeal—

(a) that the Receiver has now paid all depositors one hundred cents on the dollar, in full of principal—

(b) And the Receiver has now (over) \$18,500,000 as of December 31, 1940, collected in stock assessments—*not needed to pay any part of the one hundred cents on the dollar of all depositors' claims.*

We respectfully submit—it is unbecoming in this Court of Appeals—for the Comptroller of the Currency to attempt to conceal matters of fact of this character—namely that this Comptroller, through his agent Receiver—is now attempting to collect from this Estate—an assessment liability—to pay interest to depositors of a closed Bank.

POINT I.

The Receiver's claimed assessment liability against the Mills Estate rests on the theory that —

(1) Although the Mills Estate never held of record any shares of the capital stock of the First National Bank-Detroit, but held shares in a Michigan Holding Company, called Detroit Bankers Company,

(2) which Holding Company was the record owner of all the capital stock of the said Bank—yet

(3) The Mills Estate was liable to assessment under the National Banking Act—because it was the actual, beneficial owner of the proportionate part of the National Bank shares—

See *Barbour v. Thomas*, 86 Fed. (2) 510 (6 C. C. A.)

In *Barbour v. Thomas, supra*, it was said:

“We have proceeded upon the assumption that appellants were stockholders of the bank. They insist that they were not, that they had exchanged their certificates for those of the holding company, the stockholder of record. * * *

It has been uniformly and wisely held that the actual owners of the capital of a national bank, that is, those who have their money invested therein are ‘shareholders’ and liable to assessment. * * *

We concur in the finding that appellants are ‘actual owners’ of the stock of the bank upon which the assessment was levied. * * *” (516, 517.)

It is, therefore, apparent that defendant Comptroller of the Currency, and his, agent, the Receiver, are proceeding upon the theory that in holding the Mills Estate to an assessment liability, as a "stockholder" of this Bank—they are entitled to look through the Holding Company and

(1) find the real owner—or party in interest in this National Bank stock, and

(2) then hold *this real party in interest* liable to assessment—as *an owner* of National Bank stock.

Appellant Cleveland, therefore, respectfully submits to this Honorable Court that if the Receiver and his superior officer, the Comptroller, are permitted to go to that length in applying the National Bank Act's double liability provisions to this Estate—

then the Estate in applying its defense of the Michigan Statute of Limitations should be permitted to—

(a) show that the real parties in interest—namely the depositors of the Bank—

(b) are attempting to collect interest—as damages—from this Estate—for the detention of their deposits after the closing of the bank—

(c) which "damages for detaining" of their deposits are governed by the Three Year Statute of Limitations of Michigan.

POINT II.

THE RECEIVER'S ACTION TO RECOVER THE CLAIMED NATIONAL BANK ASSESSMENT LIABILITY FROM APPELLANT CLEVELAND'S TRUST ESTATE—

WAS BARRED BY THE THREE YEAR STATUTE OF LIMITATIONS OF MICHIGAN.

- I. The Michigan Statute of Limitations commenced to run on July 31, 1933, when the assessment was payable and the cause of action arose.
Strasburger v. Schram, 93 Fed. (2d) 246 (U. S. C A. for Dist. Col.).
- II. The Receiver's action to recover from appellant this claimed assessment liability was not commenced until more than three years thereafter.
- III. The Receiver had more than enough assets to pay all depositors in full, one hundred cents on the dollar—without using any moneys collected from any of the \$18,500,000 of stock assessment collections—whatever.
- IV. Therefore, this action against the Mills Estate must, of necessity, be one to recover interest on the deposits (over the one hundred cents on the dollar of principal) and
thus, *an action for damages for detention of the deposits* (See Ticonic Bank Case, 303 U. S. 406, 410) which would be barred by the Three Year Statute of Limitations of Michigan, Section 13976 C. L. of Michigan of 1929.
- V. Since it is now admitted by the Receiver (see showing made in motion to add to the Record on appeal) that he has ample assets with which to pay all credi-

tors' claims against the First National Bank-Detroit, the full one hundred cents on the dollar thereof—

and since it is now admitted the Receiver has so paid all claims in full—one hundred cents—

Appellant now presents her reasons respectfully to this Honorable Court—why the Three Year Statute bars this action by the Receiver—being one merely to recover interest or damages for detention of the deposits. (303 U. S. 410.)

POINT III.

No suit by the Comptroller or his Receiver was ever commenced against the Mills Estate until in March, 1938,—and since the Receiver's right of action accrued July 31, 1933, more than three years elapsed, contrary to the Michigan Statute of Limitations, as follows:

“13976. Limitation of personal actions; periods. Sec. 13. All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified; Provided, however,
* * *

“(2) Actions to recover damages for injuries to person or property shall be brought within three years from the time said actions accrue, and not afterwards.”

A.

Appellant claims that this suit is essentially an action by depositors of First National Bank-Detroit, for damages against the Bank for withholding payment of deposits after its closing in February, 1933.

In other words—the Bank Receiver is attempting to collect from appellant for the purpose of paying interest

to depositors, as damages, for the detention of their deposits after the closing of the Bank—

Such claims of the depositors are in reality against the Bank,—

for damages for “injuries” to property.

Ticonic National Bank v. Sprague, 303 U. S. 406, 410.

B.

The applicable Statute of Limitations begins to run on July 31, 1933—when the assessment was payable and the cause of action arose.

Strasburger v. Schram, 93 Fed. (2d) 246, (U. S. C. C. A. for D. C.)

C.

IN APPLYING THE STATUTE OF LIMITATIONS OF MICHIGAN—COURTS WILL DETERMINE WHO THE REAL PARTY IN INTEREST IS—AND WHAT THE ESSENTIAL NATURE AND CHARACTERISTICS OF THE ACTION ARE.

United States v. Beebe, 127 U. S. 338, 347.

United States v. Smelser, 87 Fed. (2) 799, 801.

United States v. Railway Co., 142 U. S. 510.

In *United States v. Beebe, supra*, the Supreme Court had before it the question whether—

admitting the United States was not bound by any Statute of Limitations,

yet the Court would apply the Statute as a bar—*where the real party in interest* was a private party—and no interest of the United States, the plaintiff, was involved.

The Supreme Court held the Statute of Limitations and laches a bar to the suit, saying in its opinion:

“We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and *deciding the case according to the principles governing courts of equity in like cases between private litigants.*

These principles, so far as they relate to general statutes of limitation, the laches of a party, and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. * * *

In *United States v. Smelser, supra*, the Fifth Circuit Court of Appeals, said:

“The argument is made that no statute of limitations runs against the United States. This is undoubtedly true when the Government is the real party in interest, and is proceeding simply to assert its own rights and to recover its own property, but in this case it is not suing for the purpose of asserting any public right or protecting any public interest. The suit is brought on behalf of persons entitled to participate in the various bankruptcy estates. At best, the United States is only a formal party acting to enforce the rights of private individuals. Therefore, the defense of limitation may be availed of as though the Government were out of the case. *United States v. Beebe et al.*, 127 U. S. 338, 8 S.

Ct. 1082, 32 L. Ed. 121; U. S. v. Des Moines Navigation & R. Co., 142 U. S. 510, 12 S. Ct. 308, 35 L. Ed. 1099."

D.

IN APPLYING THE STATUTE OF LIMITATIONS OF MICHIGAN—

THE COURTS WILL ALSO DETERMINE THE *USE* TO WHICH THE MONEY RECOVERED IS TO BE PUT—AS WELL AS WHO IS THE REAL PARTY IN INTEREST.

United States v. Ry. Co., 118 U. S. 120, 126.

In *United States v. Railway Company, supra*, the Supreme Court in its opinion, said:

" * * * The securities were thus held by the United States for a public use in the highest sense, the performance of a quasi international obligation; and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United States, like all other property of the Government, for the ordinary public uses. *Van Brocklin v. Tennessee*, 117 U. S. 151, 158.

The necessary conclusion is that the statute of limitations of Tennessee never ran against the right of action of the United States upon these coupons, either while the United States held them in trust for the Indians, or since they have held them for other public uses; and that the decision of the Circuit Court was erroneous.

This case does not present the question what effect the statute of limitations may have in an action on a contract in which the United States have nothing but the formal title, and the whole interest belongs to others. See *Maryland v. Baldwin*, 112 U. S. 490; *Miller v. State*, 38 Ala. 600. * * * "

And further to the effect that the use or purpose of money or other forms of relief will be examined into—in applying the Statute of Limitations—

See—

Ches. Canal Company v. U. S., 250 U. S. 123, 126.

In *Ches. Canal Company v. United States*, *supra*, the Supreme Court said, in its opinion:

“The contention of the Canal Company that the Government by becoming a stockholder in a private corporation so abdicated its governmental character that, under the circumstances of this case, it was bound as a private person by statutes and rules of limitation, cannot be allowed.

If the Government were asserting any rights with respect to the conduct of the corporation's affairs, its contracts or its torts, then its rights, duties and privileges would be no greater than those of any other stockholder. *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 907. But here the Government is pursuing a right to recover, which is not affected by its relation to the corporation as a stockholder. The declaration of the dividends, which is admitted, gave it the status of a creditor of the company, and, thereafter, the right to recover was unaffected by any stockholder relation. To this must be added that the statutes and rules of limitation relate to the remedy to enforce the right, and not to the corporate relation from which the right springs, and that, since these dividends constituted ‘public money’ applicable to public purposes only, the Government in collecting them was acting in its governmental capacity as much as if it were collecting taxes, such as those with which, no doubt, the stock which produced the dividends was purchased.

• • • ”

E.

UNDER THESE FAMILIAR RULES—IT APPEARS WITHOUT QUESTION THAT WHAT IS BEING RECOVERED IN THE CASE AT BAR *IS EXACTLY* “DAMAGES” FOR THE BANK’S DETENTION OF THE DEPOSITOR’S MONEY—AFTER THE BANK CLOSED.

The Depositors are the real plaintiffs and the Bank is the real defendant.

If the Bank is unable to pay these damages—then the depositor may claim against those conditionally liable—the stockholders.

BUT—if the principal debtor (the bank) could not be sued—because the Statute of Limitations has run—then neither may the guarantors or sureties (or whatever else the conditionally liable stockholders may be called) be sued.

F.

ASSUME, FOR INSTANCE, THAT BEFORE THE CLOSING OF THE BANK—THE BANK ITSELF HAD REFUSED FOR A PERIOD OF ONE YEAR TO PAY OVER A DEPOSITOR’S MONEY—AND THEN HAD PAID IT TO HIM—

Assume then, that the depositor brought suit against the bank for interest on his deposit, that is, damages for its wrongful detention for the years’ time—

and that this suit was started more than three years after the deposit had been repaid.

Obviously such suit is barred by the Michigan Statute of Limitations.

That being so—on the authority of *United States v. Beebe*, 127 U. S. 388, and *Hurst v. Charron*, 267 Michigan, 210, and *Phelps v. Dawson*, 97 Fed. (2) 339 (8 C. C. A.)—the Limitations Statute also bars any recovery against the stockholders of the Bank—who are conditionally liable for such bank's obligations.

G.

THE BANK MUST FIRST BE LIABLE FOR INTEREST ON DEPOSITS DETAINED BY IT—BEFORE STOCKHOLDERS OF THE BANK CAN BE HELD CONDITIONALLY LIABLE THEREFOR.

Richmond v. Irons, 121 U. S. 27, 64.

In *Richmond v. Irons*, *supra*, the Supreme Court said:

“Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny the creditor as against the shareholder the same right to recover interest *which, according to the nature of the contract or debt, would exist as against the bank itself*, of course, not in excess of the maximum liability as fixed by the statute.”

H.

If a contract liability of a surety on a bond is not enforceable in Michigan against the surety—when the principal is

not liable—*under the Hurst v. Charron, Michigan rule*—see Point V following—

obviously a mere general statutory (stockholders') secondary or conditional liability could not be enforced either.

I.

THE STOCKHOLDERS' LIABILITY IS "SECONDARY" TO THAT OF THE BANK AND CANNOT EXIST UNLESS THE BANK ITSELF IS LIABLE—AND THE STATE STATUTE OF LIMITATIONS IS CONTROLLING.

McDonald v. Thompson, 184 U. S. 71.

In McDonald v. Thompson, *supra*, the Supreme Court, said:

"Upon the theory of the plaintiff, if the statute of limitations were pleaded, it would become necessary for the receiver to show that there were outstanding claims against the bank which were not barred by the statute, and therefore that the bill might be maintained."

J.

It is well settled that shareholders of National Banks—when sued on their double liability under the Acts of Congress—

have the same rights and defenses "as any other defendant."

Meeker v. Baxter, 83 Fed. (2) 183, 186 (2 C. C. A.)

And that Receivers of National Banks have no greater rights than their Banks had as going concerns.

Rankin v. Bank, 208 U. S. 541;

Peterson v. Tillinghast, 192 Fed. 287 (6 C. C. A.)

POINT IV.**APPELLANT CALLS ATTENTION TO A MOST IMPORTANT AMENDMENT TO THE STATUTES OF LIMITATIONS OF MICHIGAN.**

In 1897 and for some years thereafter our Limitation Statutes of Personal Actions provided:

“(9728) Section 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say:

1. All actions of debt, founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States;

2. All actions upon judgments rendered in any court, other than those above excepted;

3. All actions for arrears of rent;

4. All actions of assumpsit, or upon the case, founded upon any contract or liability express or implied;

5. All actions for waste;

6. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels;

7. All other actions on the case, except actions for slanderous words or for libels.”

Section 9728 C. L. of Michigan of 1897.

“(9729) Sec. 2. All actions for trespass upon land, or for assault and battery, or for false imprisonment, and all actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

(9730) Sec. 3. All actions against sheriffs, for the misconduct or neglect of their deputies, shall be commenced within three years next after the cause of action shall accrue, and not afterwards.”

Sections 9729 and 9730 C. L. of Michigan of 1897.

A.

It is thus apparent that under the Ticonic case (303 U. S. 406) holding that a recovery of interest, on a closed bank deposit, is an action essentially by a depositor for

“damages for the failure to pay that balance upon demand,”

that under Subdivision 6, of the above (former) Michigan Limitation Statute—this action could have been commenced at any time *within six (6) years after July 31, 1933—when it accrued.*

B.

For certainly this action at bar is one for damages for the “*detaining*” of personal property.

And most certainly a claim for money on deposit—is goods or chattels or personal property—

and when it is not paid—it certainly is being “*detained.*”

C.

But by Section 13976 of the C. L. of Michigan of 1929—the Michigan Legislature recodified this Statute of Limitations for Personal Actions and expressly required—

(1) That actions for waste—be brought in three years—instead of six years as formerly.

(2) That actions of replevin and trover be brought in three years—instead of six years as formerly—

(3) And that actions for “taking, detaining or injuring goods or chattels”—be brought within three years—instead of six years—

by providing, as follows:

“Limitation of Personal Actions.

“13976. Limitations of personal actions; periods. Sec. 13. All actions in any of the courts of this state shall be commenced within six (6) years next after the causes of action shall accrue, and not afterward, except as hereinafter specified: Provided, however,

1. That actions founded upon judgments or decrees rendered in any court of record of the United States, or of this state, or of some other of the United States, and actions founded upon bonds of public officers, actions founded upon covenants in deeds and mortgages of real estate, may be brought at any time within ten (10) years from the time of the rendition of such judgment, or the time when the cause of action accrued on such bond or covenant;

2. Actions to recover damages for injuries to person or property shall be brought within three (3) years from the time said actions accrue, and not afterwards;

3. Actions against sheriffs for the misconduct or neglect of themselves, or their deputies, actions for trespass upon lands, for assault and battery, for false imprisonment, for malicious prosecution, for malpractice of physicians, surgeons or dentists, * * * shall be brought within two years from the time the cause of action accrues, and not afterwards. * * *

5. Actions founded upon libel or slander shall be brought within one (1) year from the time the cause of action accrues and not afterwards. * * *

Sec. 13976 C. L. of Michigan, 1929.

D.

And other Limitations of certain actions were changed, namely:

(1) For malicious prosecution and for malpractice—were required to be brought in two years—instead of six years, as formerly.

(2) For neglect or misconduct of Sheriffs or their Deputies—were required to be brought in two years—instead of three years, as formerly—

(3) For libel or slander—were required to be brought within one year—instead of two years—as formerly.

These changes readily appear by a simple comparison of—

(a) Sections 9728, 9729 and 9730 of Compiled Laws of Michigan of 1897—with

(b) Section 13976 of Compiled Laws of Michigan of 1929, above quoted.

E.

Thus the Legislature deliberately shortened the time for all actions for damages for “taking, detaining or injuring goods or chattels”—from six years to three years.

F.

So when the Michigan legislature amended the wording—

“taking, detaining, or injuring goods or chattels”
(See, 1897 Statute)

to the wording—

“*actions to recover damages for injuries to person or property.*” (See 1929 Statute.)

the State obviously intended that all actions—for “detaining” of personal property (formerly to be brought in six years) *must now be brought in three years.*

Since the Ticonic Case (303 U. S. 406) holds squarely that interest on closed bank deposits is

“damages for the failure to pay that balance on demand”—

obviously, such actions are now all included in the single
"cause of action" for *"injury to person or property"*
to be brought in three years.

That *"property"* includes:

(a) Money—see

In re Fixen, 102 Fed. 295 (9 C. C. A.)

In re Electric Co., 99 Fed. 400 (7 C. C. A.)

People v. Williams, 24 Mich. 156.

(b) Deposits—see

Wyatt v. State Board, 74 N. H. 552, 70 A. 387.

A deposit balance after the closing of a bank is a chose
in action—which is, of course, personal property.

See—

Gockstetter v. Williams, 9 Fed. (2) 923, 930.

Ex Parte Moore, 6 Fed. (2) 905, 908.

POINT V.

Since the Courts disregard form and look to substance
in order to find the real owner of National Bank shares
(*Laurent v. Anderson*, 70 Fed. (2) 819 (6 C. C. A.))

then obviously the Courts will ascertain the real parties
in interest—when applying the State Statutes of Limita-
tions—

and so doing—it is found that the action at bar is, in
reality, by depositors against the First National Bank-
Detroit, as primarily liable and appellant stockholder, as
conditionally liable.

Therefore, under the Michigan Rule laid down by

Hurst v. Charron, 267 Mich. 210—

since the depositors could not recover against First National Bank-Detroit after three years had elapsed from July 31, 1933—

no recovery can be had in the case at bar by the mere agent of the depositors—the Receiver—

against Appellant's Estate, which under certain circumstances, was made conditionally liable by the Acts of Congress.

IN HURST v. CHARRON, SUPRA, SUIT FOR FALSE IMPRISONMENT WAS INSTITUTED AGAINST A SHERIFF AND HIS SURETY ON THE SHERIFF'S BOND.

The suit against the Sheriff was barred by the two year Michigan Statute of Limitations.

Suits on bonds generally may be brought within ten years under the Michigan Statute of Limitations—

the question for the Michigan Supreme Court to decide was whether—

(a) The liability of the surety company was governed by the two year Limitation Statute—applying to suits against the principal on the bond—the sheriff—

(b) or by the ten year statute applying to bonds generally.

The Court held squarely that since the plaintiff could not recover against the Sheriff (after two years had elapsed) no recovery could be had against the surety.

It is respectfully submitted the suit against appellant's Mills Estate was barred on July 31, 1936.

It is further respectfully submitted that the present Michigan Statute of Limitations—Section 13976 Compiled Laws 1929, subdivision (2) providing that all “damages for injuries” to property shall be brought within three years “after the causes of action shall accrue”, applies to every action for every kind of damages done to property.

Under *Hurst v. Charron*, *supra*, the present statute applies to all “causes of action” as

distinguished from the previous Statute of Limitations of Michigan, which applied to “forms of action.”

That being so—it is clear that the old wording of the Statute of Limitations of Michigan (Comp. Laws 1897, sec. 9728) namely:

“* * * and all other actions for taking, detaining or injuring goods or chattels; * * *”

has now been combined and shortened into the present wording of—

“Actions to recover damages for injuries to person or property.”

Therefore, under familiar rules of construction—all old “forms of action” for “taking or detaining” money are now all included in the limitation of “causes of action” for “injuries” to property—and barred in three years.

See—

First National Bank v. Hawkins, 79 Fed. 50, appeal dismissed 97 Fed. 982.

POINT VII.

CORRECTIONS OF APPELLEE COMPTROLLER'S BRIEF—

Counsel for the Comptroller of the Currency make two assertions in appellee's brief that should be corrected.

FIRST: On pages 17 to 19 of Appellee Comptroller's brief—a claim is made that in the Wolf and Davis cases affirmed by the Sixth Circuit Court of Appeals without opinion—

some kind of a decision on the merits of appellant Cleveland's defense of the Statute of Limitations was made in those two Wolf and Davis cases.

To this contention of the Comptroller's counsel, it is only necessary to point to the *Per Curiam* order of the Court—quoted by appellee on page 18 of his brief.

It is perfectly obvious—that the Comptroller's Agent, the Receiver, *deliberately defeated a decision on the merits* of this question of the Statute of Limitations—by prevailing upon the Sixth Circuit Court of Appeals, to refuse any showing that the Receiver was merely collecting interest on deposits—

because the Comptroller of the Currency was not a party to the Wolf and Davis Cases in the Lower Michigan District Court—

Thus by another of the Comptroller's subterfuges (attempted time and again as is shown by the Record in Lucking v. Delano, in this Appellate Court)

any decision on the merits, in the Wolf and Davis cases,

was prevented by keeping the Comptroller of the Currency out of the Michigan District Court—

It was to forestall this kind of evasive tactics that appellant Cleveland brought this action in the District of Columbia—

where actual service on the Comptroller could be had.

SECOND: On page 19 of Appellee's brief it is claimed that in the Michigan District Court in *Schram v. Lucking*, 31 Fed. Supp. 749, a decision on the defense of the Statute of Limitations was had—

The Record in that case shows that the District Judge would not permit any proof of the fact that the Receiver had sufficient assets on hand (not including any assessment liability collections) to pay all depositors one hundred cents on the dollar.

See Printed Record on Appeal in *Schram v. Lucking*, pages 120 to 126.

On Appeal in an opinion filed by the Sixth Circuit Court of Appeals about January 9th, 1941—no discussion by the Court whatever was had on the defense of the Statute of Limitations.

And Judge Hayes sitting in the case mentioned in the next paragraph "Third" hereof—so stated in these words:

"The Court: The Circuit Court of Appeals has not passed on either one of these two questions, has it?"

Mr. Wood: If your Honor please, the points are raised—the point under the statute of limitations was raised three times. The Circuit Court of Appeals did not mention it in its opinion, but it was raised and de-

cided. That would only be for the purpose of that case, then, don't you see?"

(Transcript p. 188.)

THIRD: But in an oral opinion from the bench on January 14th, 1941, Judge Hayes in the case of Schram v. Union Guardian Trust Company, Trustee of Merrill B. Mills Estate (Appellant Cleveland's Estate) held that the Three Year Statute of Limitations was not a defense to the Receiver's suit on the assessment.

District Judge Hayes stating orally that:

"The Court: That is the question, it seems to me, whether this statute could have any application or not. We have got to determine the nature of this suit, not what is to be done with the fund. Is this a suit to collect a stock assessment, or is it a suit to recover damages?"

If it is a suit to recover damages undoubtedly the three-year statute would control, but if it is a suit to collect a stock assessment it seems another question might arise there, so I want to get your reasoning on that. * * *

"The Court: In Equity No. 8268, 493 Civil and Equity 8333 and Equity 8511 and Civil 1071, on the defense of the statute of limitations, in which the several defendants have pleaded the Michigan three-year statute, the court is of the opinion and so holds that the three-year statute of limitations does not apply to these suits, for the reason that these suits are to recover stock assessments on account of the insolvency of a national bank, and are not suits or actions to recover damages to person or property, to which the three-year statute is applicable. * * *"

(Transcript pp. 192, 195, 196.)

Appellant Cleveland respectfully submits that this ruling by Judge Hayes is directly opposed to—

United States v. Beebe, *supra* (127 U. S. 338).

United States v. Ry. Co. *supra* (118 U. S. 120).

Chesapeake Company v. United States, *supra*, (250 U. S. 123).

An appeal to the Sixth Circuit Court of Appeals is to be taken by the Trustee—and it remains to be seen whether some months from now, the Receiver will go into the Sixth Circuit Court of Appeals—

and assert, *as he did in the Wolf and Davis cases*, that the appealing stockholders *had no right* to show (because the Comptroller of the Currency was not a party to the Michigan Receiver's suit—and deliberately kept himself out of that Court) that their assessment liability was *to be used to pay interest on deposits*, and was thus barred by the Three Year Statute of Limitations.

That the character, use and purpose of the recovery sought—*will determine the application* of, and bar of the Statute of Limitations, is shown by many other authorities, such as:

DuPont v. Davis, 264 U. S. 456.

Cressey v. Meyer, 138 U. S. 525.

Curtner v. U. S. 149 U. S. 662.

Denver R. R. v. U. S., 241 Fed. 614 (S C. C. A.).

CONCLUSION OF BRIEF—

It is most respectfully submitted to this Honorable Court of Appeals that—

(a) A decision on the merits of appellant's defense of the Statute of Limitations is proper and desirable on this appeal—and

(b) Where the Comptroller of the Currency is before the Court as he is here—

but could not be brought before the Michigan District Court—

the Sixth Circuit Court of Appeals has held it proper to show the facts surrounding the assessment—and what the money collected is to be used for—see

Crawford v. Gamble, 57 Fed. (2d) 15, 17 (6 C. C. A.).

In *Crawford v. Gamble, supra*, in a suit against a National Bank stockholder on his assessment liability, it was held he could not deny insolvency or claim fraudulent reorganization and concealment of condition of the old Bank.

This Court in denying the stockholder relief under an amended answer, said, in its opinion, written by Judge Hicks:

“If it should be true as alleged that the note was executed to secure the new Bank against loss on account of assets received from the old Bank, but that such assets actually equal in value the amount at which they were turned over, and that therefore no necessity exists for an assessment to pay the note, *then upon these facts being brought home to the proper authorities appellant may doubtless be granted appropriate relief.*

*In this case there is no averment of fraudulent conduct upon the part of the Comptroller.” * * **

(c) The decision of the Comptroller of the Currency as to what are lawful debts and engagements of a Closed Bank “is certainly not final beyond all re-examination”

Mr. Justice Groner’s opinion in—

Dunn v. O’Connor, 89 Fed. (2d) 820, 826

That being so—it would seem that appellant may show (in a suit where the Comptroller of the Currency is a party) that a large recovery sought from her father’s estate—*was*

to be used to pay interest on deposits—and, therefore, was barred by the Three Year Statute of Limitations of Michigan.

(d) The Receiver's action against appellant's trust estate is essentially—

(1) *For creditors*—to recover interest on their deposits, and

(2) *Against Stockholders*—who are secondarily liable for the

(3) “contracts, debts, and engagements” of the First National Bank—Detroit—and

(4) the right of action for the “interest” belongs to the Creditors (depositors) and not to the Bank.

See—

Robbins v. Mitchell, 107 Fed. (2d) 56 (9 C. C. A.).

(5) and, therefore, appellant's argument under Point III, A, C and D, *supra*, is peculiarly applicable to the defense of the Statute of Limitations,—which is “a meritorious defense”.

See—

Guaranty Trust Company v. U. S., 304 U. S. 126.

Respectfully submitted,

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